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Study Group on the Most-Favoured-Nation clause

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Introduction

1. This report reflects the work of a Study Group established by the Commission to consider contemporary issues relating to the most-favoured nation (MFN) clause. The Commission studied the topic of the MFN clause from 1967 until 1978, although no multilateral treaty was concluded on the basis of the draft articles it had elaborated. Since then MFN had become the cornerstone of the WTO and had been included in countless bilateral and regional investment agreements. In particular, controversies had arisen in the context of bilateral investment agreements over the extension of MFN from substantive obligations to dispute settlement provisions. The report surveys those developments and provides some commentary on the interpretation of MFN provisions.[1]

2. In considering this topic, the Study Group sought to determine whether it could produce an outcome that would be useful in practice both in respect of the inclusion of MFN clauses in treaties and in the interpretation and application of MFN clauses in the decisions of tribunals and elsewhere. The Study Group considered whether there was any utility in revising the 1978 draft articles or in preparing a set of new draft articles and came to the conclusion that there was not.[2] While the Study Group focused its particular attention on MFN clauses in the context of investment agreements, it also sought to consider MFN clauses in a broader context. The conclusions of the Study Group are set out in paragraphs 212–217 below.

Part I – Background

3. This Part sets out the background to the Study Group's work and describes the previous work of the Commission on MFN. It then considers developments in the use of MFN clauses since 1978.

A. Genesis and purpose of the Study Group's work

4. In 1978, the Commission adopted draft articles on the topic of the most-favoured-nation (MFN) clause.[3] No action was taken by the General Assembly to convene a conference to turn these draft articles into a convention. In 2006, at the fifty-eighth session of the ILC, the Working Group on the Long-Term Programme of Work discussed whether the MFN clause should be considered again. The matter was considered by an informal working group of the Commission at its fifty-ninth session (2007), and at its sixtieth session (2008) the Commission decided to include the topic of the most-favoured-nation clause on the long-term work programme. At the same session, the Commission decided to include the topic in its current programme of work and to establish a study group at its sixty-first session, which was co-chaired by Mr. Donald McRae and Mr. Rohan Perera.[4] Since 2012,

[1] The terms "MFN clause" and "MFN provision" are used interchangeably in this report.

[2] This conclusion was not unanimous and some members of the Study Group felt that it would be appropriate to undertake a revision of the 1978 draft articles.

[3] *Yearbook of the International Law Commission, 1978*, vol. II (Part Two), pp. 16–72.

[4] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), paras. 351–352. See also *ibid., Sixty-fourth Session Supplement No. 10* (A/64/10), paras. 211–216; *ibid., Sixty-fifth Session Supplement No. 10* (A/65/10), paras. 359–373; *ibid., Sixty-sixth Session, Supplement No. 10* (A/66/10), paras. 349–363.

the Study Group has been chaired by Mr. McRae and, in his absence, by Mr. Mathias Forteau.

5. In deciding to look again at the question of the most-favoured-nation clause, the Commission was influenced by the developments that had taken place since 1978, including the expansion of the application of MFN in the context of the WTO, the pervasive inclusion of MFN provisions in bilateral investment treaties and investment provisions in regional economic integration arrangements, and the specific difficulties that had arisen in the interpretation and application of MFN provisions in investment treaties.

6. The Study Group held 23 meetings between 2009 and 2015. The Study Group agreed upon a framework that would serve as a road map for its work, in the light of issues highlighted in the syllabus on the topic.[5] Its work proceeded on the basis of informal working papers and other informal documents were prepared by members of the Commission to assist the Study Group in its work.[6]

7. Throughout its consideration of the topic, the Commission received comments from States in the Sixth Committee on the work of the Study Group. Although some States showed reluctance over the Commission's consideration of the topic,[7] the general view was that the Commission could make a contribution in this area. The Commission had to respect the fact that MFN provisions come in a variety of forms and uniformity in interpretation or application could not necessarily be expected.[8] In line with the general orientation of the Study-Group, the view was frequently expressed that the Commission should not produce new draft articles nor attempt to revise the 1978 draft articles.[9] Generally, it was felt that the

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[5] *Ibid., Sixty-fourth Session Supplement No. 10* (A/64/10), para. 216.

[6] The Study Group considered working papers on the following: (a) Review of the 1978 Draft Articles of the MFN Clause (Mr. Shinya Murase); (b) MFN in the GATT and the WTO (Mr. D.M. McRae); (c) The Most-Favoured-Nation Clause and the *Maffezini case* (Mr. A.R. Perera); (d) The Work of OECD on MFN (Mr. M.D. Hmoud); (e) The Work of UNCTAD on MFN (Mr. S.C. Vasciannie); (f) The Interpretation and application of MFN clauses in investment agreements (Mr. D.M. McRae); (g) The Interpretation of MFN Clauses by Investment Tribunals (Mr. D.M. McRae) (this working paper was a restructured version of the working paper, "Interpretation and Application of MFN Clauses in Investment Agreements"); (h) The Effect of the Mixed Nature of Investment Tribunals on the Application of MFN Clauses to Procedural Provisions (Mr. M. Forteau); (i) A BIT on Mixed Tribunals: Legal Character of Investment Dispute Settlements (Mr. S. Murase); and (j) Survey of MFN language and *Maffezini*-related Jurisprudence (Mr. M.D. Hmoud). The Study Group also had before it: (a) A *Catalogue of MFN provisions* (prepared Mr. D.M. McRae and Mr. A.R. Perera); (b) an informal document, in tabular form, identifying the arbitrators and counsel in investment cases involving MFN clauses, together with the type of MFN provision that was being interpreted; (c) an informal working paper on Model MFN clauses post-*Maffezini*, examining the various ways in which States have reacted to the *Maffezini* case; (d) an informal working paper providing an overview of MFN-type language in Headquarters Agreements conferring on representatives of States to the organization the same privileges and immunities granted to diplomats in the host State; (e) an informal working paper on MFN clauses in Diplomatic treaties; (f) an informal working paper on Navigation Agreements and the MFN clause; (g) an informal working paper on "Bilateral Taxation Treaties and the MFN clause".

[7] See e.g.: A/C.6/65/SR.25, at para. 75 (Portugal); A/C.6/66/SR.27, at para. 49 (Iran (Islamic Republic of)); A/C.6/67/SR.23, at para. 27 (Iran (Islamic Republic of)).

[8] See e.g.: A/C.6/64/SR.23, at para. 52 (United States of America); A/C.6/64/SR.27, para.31 (Japan); A/C.6/65/SR.26, at para. 17 (United States of America); A/C.6/66/SR.27, at para. 94 (United States of America); A/C.6/67/SR.21, at para. 103 (United States of America).

[9] See e.g.: A/C.6/64/SR.23, at para. 52 (United States of America); A/C.6/65/SR.25, at para. 82 (United Kingdom); A/C.6/65/SR.26, at para. 17 (United States of America); A/C.6/69/SR.25, at para. 115 (Austria); A/C.6/69/SR.26, at para. 18 (United Kingdom); A/C.6/69/SR.27, at para. 26 (United States of America).

Commission should identify trends in the interpretation of MFN clauses and provide guidance for treaty negotiators, policy makers and practitioners in the investment area.[10]

8. The Study Group decided not to attempt to decide between the conflicting views of investment tribunals over the application of MFN clauses to dispute settlement provisions. The Commission does not have an authoritative role in relation to the decisions of investment tribunals, and to conclude that one tribunal was right and another wrong would simply insert the Commission as just another voice in an ongoing debate.

9. Instead, the Study Group considered that some explanation or elaboration of the Commission's approach in 1978 would be useful, particularly in light of the uncertainty about how MFN clauses are to be interpreted. The Study Group also felt that it would be useful to elaborate on the application of the rules of treaty interpretation to the interpretation of MFN provisions.

B. The 1978 draft articles

1. Origins

10. When the topic of MFN was first proposed in the Commission in 1964, it was in the context of the discussion of "treaties and third States."[11] And when the Commission decided to include the topic in its programme of work in 1967, the title of the topic was "the most-favoured-nation clause in the law of treaties."[12] It was a topic, therefore, on treaty law.

11. Historically, MFN clauses were contained in bilateral treaties of friendship, commerce and navigation whose main function was to regulate a variety of matters between the parties, usually of a commercial nature.[13] Although the Special Rapporteurs for the 1978 draft articles looked broadly at the way in which MFN clauses had been applied in domestic courts, in treaties, and in the decisions of international tribunals, the 1978 draft articles focused generally on the traditional function of MFN clauses in bilateral treaties on trade.

12. Thus, while the core function of an MFN clause is often seen today to be its automatic and unconditional extension of benefits, the 1978 draft articles contain detailed and lengthy provisions on the "condition of compensation" and "condition of reciprocal treatment," reflecting perhaps a preoccupation in part with the situation of State trading countries which did not favour the completely automatic operation of the MFN clauses. Furthermore, controversy was to develop over the treatment of matters such as customs unions and preferences for developing countries.

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[10] See e.g.: A/C.6/64/SR.18, at para. 66 (Hungary); A/C.6/64/SR.22, at para.75 (New Zealand); A/C.6/65/SR.26, at para. 45 (Sri Lanka); A/C.6/66/SR.27, at para. 28 (Sri Lanka); A/C.6/66/SR.27, at para. 69 (Russian Federation); A/C.6/66/SR.27, at para. 78 (Portugal); A/C.6/66/SR.27, at para. 89 (Viet Nam); A/C.6/66/SR.28, at para. 21 (Canada); A/C.6/67/SR.20, at para. 109 (Canada); A/C.6/69/SR.25, at para. 21 (Viet Nam); A/C.6/69/SR.26, at para. 69 (Singapore); A/C.6/69/SR.26, at para. 73 (Australia); A/C.6/69/SR.27, at para. 76 (Republic of Korea).

[11] United Nations, *The Work of the International Law Commission*, Eighth ed., vol. 1, (2012), U.N. Sales No. E.12.V.2 (ISBN 978-92-1-133720-4), p. 171.

[12] *Ibid.*, p. 172.

[13] Shinya Murase, *Kokusaiho no Keizaiteki Kiso* (Tokyo: Yuhikaku, 2001), pp. 14–201 [in Japanese]; Shinya Murase, "The Most-Favored-Nation Treatment in Japan's Treaty Practice 1854–1905" *American Journal of International Law*, vol. 70 (1976), pp. 273–297.

2. Key provisions

13. Although the 1978 draft articles dealt with a variety of matters, some of which appear to have been supplanted by subsequent developments, they laid out the core elements of MFN provisions and provided directions for their application that are key to the functioning of MFN clauses today. The definition of an MFN clause was as follows:

> "treatment accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that State, not less favourable than treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State."[14]

Although this definition has been criticized as being obscure[15] it does contain the key elements of an MFN clause, and the subsequent provisions of the draft articles elaborate on this.

14. In particular, the draft articles make clear that MFN treatment is not an exception to the general rule of the effect of treaties vis-à-vis third States.[16] The right to MFN treatment is premised on the treaty containing the MFN clause being the basic treaty establishing the juridical link between the granting State and the beneficiary State. In other words, the right of the beneficiary State to MFN treatment arises only from the MFN clause in a treaty between the granting State and the beneficiary State and not from a treaty between the granting State and the third State. Thus, no *jus tertii* is created. In this regard, the Commission was giving effect to what had already been decided by the International Court of Justice in the *Anglo-Iranian Oil Co.* case.[17]

15. The draft articles also include an important statement of the *ejusdem generis* principle in its application to MFN clauses. In doing this, the Commission had relied extensively on the practice and jurisprudence under GATT of the notion of "like products." The Commission's treatment of the *ejusdem generis* principle is in two parts. First, article 9 (1) provides:

> "Under a most-favoured-nation clause, the beneficiary State acquires, for itself or for those persons or things in a determined relationship with it, only those rights that fall within the limits of the subject-matter of the clause."

Second, article 10 (1) provides:

> "Under a most-favoured-nation clause the beneficiary State acquires a right to most-favoured-nation treatment only if the granting State extends to a third State benefits within the subject matter of the clause."

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[14] See for example, draft art. 5 of the 1978 draft articles, *Yearbook ... 1978*, vol. II, Part Two, p. 21.

[15] This difficulty was pointed out by the comment of Luxembourg on the draft articles on first reading as follows: "Questions arise concerning the scope of the formula ... in which reference is made to 'persons' or 'things' in a 'determined relationship' with a given State. To what persons does it refer? While the situation may be clear enough in the case of physical persons, it is much less so in the case of economic enterprises, whether or not corporate bodies. Does the reference to 'things' apply only to material objects or also to intangible goods such as the performance of services or commercial, industrial or intellectual property rights? Finally, what should be understood by the words 'determined relationship' with a State, especially in the case of economic enterprises or intangible goods?" *Ibid.*, p. 167.

[16] *Ibid.*, pp. 24–25 (draft arts. 7 and 8).

[17] *Anglo-Iranian Oil Co. Case (United Kingdom v. Iran), Preliminary Objection*, Judgment of 22 July 1952, *I.C.J. Reports 1952*, pp. 109–110.

16. Articles 9 and 10 also make clear that where the benefit is for persons or things within a determined relationship with the beneficiary State, they must belong to the same category and have the same relationship with the beneficiary State as persons or things within a determined relationship with the third State.[18]

17. The 1978 draft articles also dealt with the operation of MFN clauses that were conditional on the receipt of compensation or the provision of reciprocal benefits. In addition, it provided specific rules relating to MFN treatment and developing States, frontier traffic, and landlocked States.

18. The provisions relating to developing countries turned out to be one of the reasons why the work of the Commission remained as draft articles. The provisions were seen either as going beyond what was accepted in customary international law[19] or being out of touch with developments that were occurring elsewhere, particularly in the context of the GATT.[20] Several States thought the draft articles did not do enough to protect the interests of developing countries.[21] Others thought that draft article 24, on arrangements between developing States, was too restrictive[22] or needed more clarification.[23] Equally, the failure of the draft articles to take account of the complexities of the relationship between MFN treatment under bilateral agreements and MFN treatment under multilateral agreements led to discontent with the draft articles.[24] In particular, many States were reluctant to see the draft articles developed into a binding convention without a specific provision exempting custom unions.[25] Some States voiced concerns that the draft articles would prevent States "from embarking upon any process of regional integration."[26]

3. The decision of the General Assembly on the 1978 draft articles

19. After inviting governments to comment on the draft articles from 1978 to 1988, the General Assembly concluded consideration of the subject by deciding,

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[18] *Yearbook ... 1978*, vol. II, Part Two, p. 27 [see especially draft art. 10 (2)].

[19] A/C.6/33/SR.37 at para. 52 (Canada).

[20] A/C.6/33/SR. 46 at para. 2 (Denmark); A/C.6/33/SR. 37 at para. 11 (United Kingdom).

[21] A/C.6/33/SR.37 at para. 24 (Liberia); A/C.6/SR.41 at para. 43 (Ecuador); A/C.6/SR.43 at para. 23 (Ghana); A/C.6/SR.45 at paras. 21–26 (Swaziland). The European Economic Community thought the draft articles should have dealt explicitly with relations between States of differing economic status: A/C.6/33/SR.32 at paras. 6–7, 16–17 (EEC). See also A/C.6/SR.39 at para. 24 (Belgium).

[22] A/C.6/33/SR.32 at para. 20 (Jamaica); A/C.6/SR.42 at para. 30 (Bangladesh).

[23] A/C.6/33/SR.37 at para. 42 (Chile); A/C.6/SR.43 at para. 39 (Guyana). Several States called for better legal definition of "developed" and "developing" States: A/C.6/SR.39 at para. 27 (Belgium); A/C.6/SR.40 at para. 5 (USA).

[24] A/C.6/33/SR. 33 at para. 28 (Federal Republic of Germany); A/C.6/33/SR.37 at para. 33 (Romania); A/C.6/SR.40 at para. 63 (Syria); A/C.6/SR.41 at para. 60 (Libyan Arab Jamahiriya). Italy was disappointed that scope of the draft articles did not include supra-national bodies: A/C.6/SR.44 at para. 9 (Italy).

[25] A/C.6/33/SR. 31 at para. 5 (Netherlands); A/C.6/33/SR. 33 at para. 2 (Denmark); A/C.6/33/SR. 36 at paras. 2–3 (Sweden); A/C.6/33/SR. 37 at para. 2 (Austria); A/C.6/33/SR. 37 at para. 10 (UK); A/C.6/SR.39 at para. 10 (Greece); A/C.6/SR.39 at para. 25 (Belgium); A/C.6/SR.39 at para. 48 (Colombia); A/C.6/SR.40 at para. 52 (Zambia); A/C.6/SR.41 at para. 11 (Turkey); A/C.6/SR.42 at para. 6 (Ireland); A/C.6/SR.42 at para. 39 (Nigeria); A/C.6/SR.42 at para. 43 (Peru); A/C.6/SR.43 at para. 11 (Venezuela); A/C.6/SR.43 at para. 30 (Uruguay); A/C.6/SR.44 at para. 13 (Italy); A/C.6/SR.44 at para. 20 (Egypt); A/C.6/SR.45 at para. 27 (Swaziland); A/C.6/33/SR. 46 at para. 2 (summary by International Law Commission Chairman).

[26] A/C.6/33/SR.32 at paras. 8–12 (European Economic Community). See also A/C.6/33/SR. 31 at para. 4 (Netherlands): "The most glaring deficiency of the final draft was that it still largely ignored the modern development of regional economic co-operation and its impact on the application of the most favoured nation clause."

"to bring the draft articles on most-favoured-nation clauses, as contained in the Report of the Commission on the work of its thirtieth session, to the attention of Member States and interested intergovernmental organizations for their consideration in such cases and to the extent as they deemed appropriate."[27]

C. Subsequent developments

20. The circumstances that existed when the Commission dealt with the MFN clause in its reports and the 1978 draft articles have changed significantly. There has been a narrowing of the use of MFN treatment to the economic field, but at the same time a broadening of the scope of MFN treatment within that field. The Special Rapporteurs for the 1978 draft articles had dealt with a wide range of areas where MFN clauses operated, including navigation rights and diplomatic immunities. Today, the MFN principle operates primarily in the realm of international economic law, in particular in respect of trade and investment. In certain cases MFN treatment provided for on the basis of bilateral treaties has been superseded by multilateral conventions providing obligations of non-discrimination more broadly.[28]

21. There are other areas in which non-discrimination clauses that resemble MFN provisions are found, including headquarters agreements and tax treaties, but their use appears to be infrequent and has not given rise to controversy.[29] By contrast, in the economic field, MFN treatment has expanded in range and in its frequency of use. The GATT, which enshrined MFN treatment as a core principle of the multilateral trading system, has now been subsumed into the WTO where MFN treatment has been applied to both trade in services and trade-related aspects of intellectual property. Moreover, MFN treatment has become a core principle of bilateral investment treaties, a form of treaty that had little practical existence in the days when the 1978 draft articles were being prepared. Even though the first BIT, was concluded in the late 1950s, the end of the Cold War witnessed a proliferation of such agreements, as well as frequent recourse to dispute settlement provisions contained therein.[30]

22. Indeed, the dispute settlement processes of the WTO, as well as those that exist for the resolution of investment disputes have led to a body of law on the interpretation of MFN provisions, particularly in the trade and investment contexts. GATT article I, which embodies the MFN clause, has been invoked in WTO dispute settlement and interpreted by the WTO Appellate Body. MFN in the field of trade in services has also been the subject of dispute settlement. In addition, there is a significant body of cases where tribunals have sought to interpret the scope and application of MFN provisions in bilateral investment treaties with conflicting and contradictory outcomes.

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[27] General Assembly, Decision 46/416 of 9 December 1991.

[28] Vienna Convention on Diplomatic Relations, done at Vienna on 18 April 1961, United Nations, *Treaty Series*, vol. 500, p. 95 and Vienna Convention on Consular Relations done at Vienna on 24 April 1963, United Nations, *Treaty Series*, vol. 596, p. 261.

[29] Agreement Between the United Nations and the United States Regarding the Headquarters of the United Nations, done at Lake Success on 26 June 1947, United Nations, *Treaty Series*, vol. 11, No. 147, p. 11 at art V §15 (4); Agreement Between the Government of Australia and the Government of the United Mexican States for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, done at Mexico City on 9 September 2002, Australian Treaty Series vol. 4 (2004), available at <http://www.austlii.edu.au/au/other/dfat/treaties/2004/4.html>.

[30] Stephan W. Schill, "W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law", *EJIL*, vol. 22 (2011), pp. 875–908.

23. In short, the context in which MFN operates today is quite different from that in which MFN provisions operated when the Commission earlier considered the topic. On this basis, the Commission considered that there was some value in revisiting the topic.

D. The analysis of MFN provisions by other bodies

24. The Study Group was aware that both the United Nations Conference on Trade and Development (UNCTAD) and the Organization for Cooperation and Development (OECD) had produced a significant amount of work on MFN clauses.

1. UNCTAD

25. UNCTAD's involvement in the policy of international development is longstanding, in particular through the dissemination of technical information on investment matters. It has been responsible for the development of two series of publications: one on "Issues in International Investment Agreements" and the other entitled "Series on International Investment Policies for Development." More recently it has published a series entitled "International Investment Agreements Issues Notes," which includes an annual publication on "Recent Developments in Investor-State Dispute Settlement (ISDS)." UNCTAD's compendia on international investment agreements – International Investment Instruments: A Compendium,[31] and Investment Policy Hub[32] – are invaluable sources for locating international investment agreements.

26. MFN issues are dealt with as part of a broader discussion of investment agreements in a variety of other UNCTAD publications. In particular, the annual review of ISDS (investor-state dispute settlement) by UNCTAD in its Issues Notes series provides a summary of the decisions of investment tribunals for the past year. Included in those summaries are decisions dealing with the interpretation of MFN provisions. Decisions are summarized and differences between them and those of previous years noted, but the report does not analyze the interpretative approaches of investment tribunals.

27. UNCTAD's work on MFN provides important background and context for a consideration of MFN provisions. It has tended to concentrate on the broad policy issues applicable to MFN provisions rather than on questions of customary international law and treaty interpretation that are the focus of the work of the Study Group.

2. OECD

28. The primary role of the OECD in the field of investment has been the drafting of instruments to facilitate investment to which members may become party. These instruments contain obligations of non-discrimination, including those expressed in the form of MFN clauses.

29. The OECD Code of Liberalisation of Capital Movements, which covers direct investment and establishment, and the OECD Code of Liberalisation of Invisible Operations, which covers services, both contain an obligation of non-discrimination. Although not worded in traditional MFN language, this obligation is regarded by OECD as a functional equivalent of an MFN provision. Common article 9 of the Codes provides:

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[31] UNCTAD, *International Investment Instruments: A Compendium*, UNCTAD/DITE/4 vol. XIII, available at <http://unctad.org/en/pages/PublicationArchive.aspx?publicationid=410>. Volumes VI, VII, VIII, IX and X are also available in electronic form.

[32] UNCTAD, "Investment Policy Hub" website at <http://investmentpolicyhub.unctad.org/IIA>.

"A Member shall not discriminate between other Members in authorising the conclusion and execution of the transactions and transfers which are listed in Annex A and which are subject to any degree of liberalisation."

30. In its guide to the Codes, OECD has written:[33]

"OECD members are expected to grant the benefit of open markets to residents of all other member countries alike, without discrimination. When restrictions exist, they must be applied to everybody in the same way. ... The Codes do not permit the listing of reservations to the non-discrimination, or MFN, principle."

31. The Codes contain significant exceptions to the application of MFN treatment, including for those members who are part of a customs union or special monetary system, and more generally in respect of the maintenance of public order or the protection by the member of public health, morals and safety, the protection of the member's essential security interests, or the fulfillment of its obligations relating to international peace and security.[34]

32. OECD was also responsible for the launching of negotiations for a Multilateral Agreement on Investment (MAI). Included in that agreement was an MFN provision which referred to "treatment no less favourable" and applied to "the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment, sale or other disposition of investments."[35] At the time negotiations were abandoned, there was disagreement over whether the MFN clause should apply to investments within the territory of the State granting MFN treatment and whether the term "in like circumstances" should qualify the beneficiaries entitled to receive MFN treatment.

33. The MAI draft also contained a number of exceptions to the granting of MFN treatment, including security interests, obligations under the Charter of the United Nations, and taxation. There were also a number of controversial exceptions that were never resolved, including public debt rescheduling, transactions in pursuit of monetary and economic policies, and regional economic integration agreements.[36]

Part II – Contemporary relevance of MFN clauses and issues relating to their interpretation

34. This Part deals with the nature of MFN clauses and how they are currently being utilized in treaties and applied. It also examines interpretative questions that have arisen regarding MFN clauses, particularly in the context of international investment agreements.

A. Key Elements of MFN

35. As is evident from the 1978 draft articles, MFN provisions in bilateral or multilateral treaties[37] are composed of the following key elements:

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[33] OECD, *OECD Codes of Liberalisation: Users Guide 2008* (online: OECD, 2007) at p. 11, available at <http://www.oecd.org/investment/investment-policy/38072327.pdf>.

[34] *Ibid.*, at art. 3.

[35] OECD Negotiating Group on the Multilateral Agreement on Investment, The Multilateral Agreement On Investment Draft Consolidated Text, 22 April 1998, OECD document DAFFE/MAI(98)7/REV1.

[36] *Ibid.*, p. 13.

[37] The Commission did not rule out the possibility that an MFN provision could be found elsewhere than in a treaty. *Yearbook ... 1978*, supra note 1, p. 16 [draft article 1].

- First, under such a provision each State agrees to grant a particular level of treatment to the other State or States, and to persons and entities in a defined relationship with that State or those States.[38]

- Second, the level of treatment provided by an MFN provision is determined by the treatment given by the State granting MFN to third States ("no less favourable").[39]

- Third, an MFN commitment applies only to treatment that is in the same category as the treatment granted to the third State ("*ejusdem generis*").[40]

- Fourth, the persons or entities entitled to the benefit of MFN treatment are limited to those in the same category as the persons or entities of the third State that are entitled to the treatment being claimed.[41]

36. In the application of MFN provisions, it is the second and third of these elements that create the greatest difficulty. The question of what constitutes no less favourable treatment, and the question of whether the treatment claimed is of the same category as the treatment granted to third States, have given rise to disputes under the GATT and the WTO. And, as will be seen, the question whether the treatment claimed is of the same category as the treatment granted to third States has been at the heart of current controversies in the investment field.

1. The rationale for MFN treatment

37. MFN treatment is essentially a means of providing for non-discrimination between one State and other States and therefore can be seen as a reflection of the principle of sovereign equality. However, its origins suggest that it was founded on the more pragmatic desire to prevent competitive advantage in the economic sphere. As the Special Rapporteur for the 1978 draft articles pointed out in his first report,[42] traders in medieval times who could not gain a monopoly in foreign markets sought to be treated no worse than their competitors. Such treatment was then embodied in agreements between sovereign powers — treaties of friendship, commerce and navigation — and went beyond trade to ensure that a sovereign's subjects in a foreign State were treated as well as the subjects of other sovereigns.

38. The prevention of discrimination is also linked to the economic concept of comparative advantage, which lies at the foundation of notions of free trade and economic liberalism. Under the theory of comparative advantage, countries should produce what they are most efficient at producing. Trade in efficiently produced goods, so the theory goes, benefits consumers and maximizes welfare.[43] Efficiency is lost, however, when country A discriminates against the goods of country B in favour of similar goods of country C. MFN prevents such discrimination by ensuring that country A provide treatment to country B that is no less favourable than the treatment to country C. For this reason, MFN treatment has been seen as the cornerstone of GATT and the WTO.[44]

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[38] *Ibid.*, p. 21 (draft art. 5).

[39] *Ibid.*

[40] *Ibid.*, p. 27 (draft art. 9).

[41] *Ibid.* (draft art. 10 (2)).

[42] *Yearbook ... 1968*, vol. II, p. 165, document A/CN.4/L.127.

[43] John Jackson, *The World Trading System: Law and Policy of International Economic Relations*, 2nd edition (Cambridge: MIT Press, 1997), at Chapter 2.

[44] WTO Appellate Body Report, *Canada – Certain Measures Affecting The Automotive Industry*, WTO document WT/DS139/AB/R (31 May 2000). See also WTO Appellate Body Report, *European*

39. The debate between the benefits of non-discrimination and the benefits of preference, particularly in relation to developing countries, has been a long one, and in many respects still remains unresolved in the field of trade.[45]

40. The relevance of the economic rationale for MFN treatment beyond the field of trade in goods to trade in services, investment, and other areas is also a matter of controversy. It has been argued that whereas in the field of trade, non-discrimination protects competitive opportunities (the comparative advantage rationale), in the field of investment the purpose of non-discrimination is to protect investors' rights.[46] Nonetheless, regardless of the specific rationale for non-discrimination outside the field of trade in goods, agreements relating to investment and to services continue to include MFN treatment (and national treatment) provisions. Having noted these differences in view, the Study Group did not see any need to further consider the question of the economic rationale for MFN provisions.

B. Contemporary practice regarding MFN clauses

1. MFN clauses in GATT and the WTO

41. MFN treatment has always been regarded as the central obligation of the multilateral trading system. Set out in its most comprehensive form in GATT article I.1, an MFN obligation is also found directly and indirectly in other provisions of the GATT.[47] There were two key aspects to MFN treatment as incorporated in the GATT. First, it operated multilaterally and "advantages, favours, privileges and immunities" granted to one contracting party had to be granted to all contracting parties. Second, it was to be granted unconditionally.

42. The centrality of MFN treatment to GATT lay in the fact that it avoided discrimination in the application of tariffs and other treatment accorded to goods as they crossed borders. Historically tariffs were negotiated bilaterally or among groups of countries and then applied across the board to all contracting parties by virtue of the MFN provision. This was the way in which equality of competitive opportunities between traders was to be preserved.

43. However, within the WTO system, MFN treatment expanded from its application to trade in goods to the new regime for trade in services.[48] It was included in new obligations under the WTO concerning trade-related aspects of intellectual property (TRIPS). Thus, MFN treatment is pervasive throughout the whole of the WTO system.

44. The Study Group reviewed the way in which MFN clauses had been applied in both the GATT and the WTO. From that review certain general conclusions could be drawn about the scope and application of MFN treatment within the WTO system.

Communities – Conditions for the Granting of Tariff Preferences to Developing Countries, WTO document WT/DS246/AB/R (adopted 20 April 2004), at para. 101.

[45] *The Future of the WTO: Addressing Institutional Challenges in the new Millennium*, Report of the Consultative Board to the Director-General Supachai Panitchpakdi (Geneva: WTO, 2004) at paras. 88–102 ["Sutherland Report"].

[46] Nicholas DiMascio, and Joost Pauwelyn, "Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?" *AJIL* vol. 102 (2008), pp. 48–89.

[47] General Agreement on Tariffs and Trade 1994, 15 April 1994, United Nations, *Treaty Series*, vol. 1867, p. 187 at arts. II; III (4); IV; V (2), (5) and (6); IX (1); XIII (1); XVII (1); and XX (j).

[48] General Agreement on Trade in Services, 15 April 1994, United Nations, *Treaty Series* vol. 1869, p. 183 at Article II.

45. First, notwithstanding the fact that MFN provisions in the WTO are worded differently, the approach of the Appellate Body has been to treat them as having the same meaning.[49] The textual interpretation of the words has less importance than the underlying concept of MFN treatment.

46. Second, the Appellate Body has interpreted MFN treatment under GATT article I as having the broadest possible application. As the Appellate Body said, "all" advantages, favours, and privileges really means "all."[50] The specific issue of whether MFN treatment applies to both substantive and procedural rights has not been addressed by the Appellate Body.

47. Third, although MFN treatment was meant to be unconditional, all of the WTO agreements contain exceptions to the application of MFN treatment so that in practice its application is more restricted than it appears. Exceptions for customs unions and free trade areas,[51] for safeguards and other trade remedies, as well as general exceptions and provisions for "special and differential treatment" all limit the actual scope of MFN treatment under the WTO agreements. Even though the Appellate Body has often taken a restrictive approach to the interpretation of exceptions,[52] their range and coverage nonetheless frequently limits the range and application of MFN treatment under WTO agreements.

48. The particular nature of the WTO system, with its own set of agreements and a dispute settlement process to interpret and apply these agreements, means that there is limited direct relevance of the interpretation of MFN provisions under the WTO for MFN clauses in other agreements. The interpretation of MFN treatment can continue within the WTO system regardless of how MFN clauses are treated in other contexts.

49. Nonetheless, MFN treatment within the WTO system is not completely contained within that system. It may apply beyond the scope of the WTO agreements. Prior to the WTO, the question had arisen whether a GATT Contracting Party could by virtue of an MFN provision claim the benefits provided under a Tokyo Round "Code" to which it was not a party. That matter was never resolved. A contemporary question relates to whether a WTO Member that is not a party to one of the "Plurilateral Agreements" which are related to but not part of the WTO Agreements, can use the MFN provision to claim benefits under the Plurilateral Agreements even though it is not a party to that agreement. Again, this matter has yet to be resolved.

50. A related question arises under the MFN provision in GATS. Trade in services under GATS includes the provision of a service by a supplier of one Member through commercial presence of natural persons in the territory of another Member.[53] Article II of GATS provides:

> "With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country."

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[49] WTO Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (adopted 25 September 1997) at para. 231.

[50] *Canada – Certain Measures Affecting The Automotive Industry*.

[51] GATT, at art. XXIV. Customs unions and free trade areas are becoming of even greater importance with the proliferation of regional trade agreements.

[52] See for example: WTO Appellate Body Report, *United States – Import Prohibition Of Certain Shrimp And Shrimp Products*, WTO document WT/DS58/AB/R (12 October 1998).

[53] GATS, art. 1 (2) (d).

51. Measures affecting service suppliers that arise under bilateral investment treaties with third States potentially fall within the scope of article II. In other words, the question is whether a WTO Member could, by virtue of GATS article II, claim the benefit of the provisions of a bilateral investment treaty between another WTO Member and a third State to the extent that the measures under that treaty provide more favourable treatment to service suppliers of that third State. As yet there has been no practice or jurisprudence on this.

52. Notwithstanding the fact that there are outstanding issues in relation to MFN treatment under the WTO that may become contentious in the future, the Study Group did not consider that it could add anything by pursuing those issues at the present time. The WTO has its own mechanism for resolving disputes and the WTO agreements are interpreted on the basis of articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT).[54] The existence of an appellate structure ensures that panel interpretations of the variety of MFN provisions in the agreements can be rethought and if necessary overturned.

2. MFN in other trade agreements

53. Regional and bilateral trade agreements[55] generally do not include MFN provisions in relation to trade in goods. Such agreements already provide preferential treatment to all the parties in respect of tariff treatment, so MFN treatment has little relevance. Instead, national treatment is important. However, some regional agreements contain a form of MFN provision in respect of trade in goods, in that they provide that if the MFN customs duty rate is lowered then that rate should be provided to the other party once it falls below the regional trade agreement agreed rate.[56]

54. By contrast, regional or bilateral economic agreements that go beyond trade provide for MFN treatment in respect of services and investment.[57] In this respect, they are no different than the WTO in respect of services or bilateral investment agreements. In the case of such agreements, the approach to interpretation of MFN treatment would be no different than that applicable to bilateral investment agreements. However, so far there seems to be no judicial commentary on these provisions, and they have generally escaped academic analysis.

3. MFN in investment treaties

(a) Types of MFN provisions in investment agreements

55. Obligations under investment agreements to provide MFN treatment are longstanding. They were found in the earlier treaties of friendship, commerce and navigation and have been continued in modern bilateral investment treaties, and regional trade agreements that include provisions on investment. MFN treatment and national

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[54] Done at Vienna on 23 May 1969, United Nations, *Treaty Series*, vol. 189, No. 2545, p. 150.

[55] The term "regional agreements" also includes agreements referred to as regional economic integration agreements, association agreements and customs unions.

[56] Free trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, *Official Journal of the European Union* L127 vol. 54 (14 May 2011), p. 9 at art. 2.5; Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part, *Official Journal of the European Union* L352 vol. 45 (30 December 2002), p. 19 at art. 60 (4).

[57] North American Free Trade Agreement, *International Legal Materials* vol. 32 (1993), pp. 289 and 605 at Chap. 11, art. 1103 (investment), art. 1203 (services), and art. 1406 (financial services).

treatment are thus included in bilateral investment treaties as if, as in the GATT, they are cornerstone obligations.

56. While MFN clauses in investment agreements are worded in a variety of ways, they generally mirror the "no less favourable treatment" language of GATT article II. For example, the agreement between Austria and the Czech and Slovak Republics of 15 October 1990 provides:

> "Each Contracting Party shall accord investors of the other Contracting Party treatment no less favourable than that accorded to its own investors or investors of a third State and their investments."[58]

57. In some cases an MFN clause includes both an obligation to provide MFN treatment and an obligation to provide national treatment. For example, the Argentina-United Kingdom agreement of 11 December 1990 provides:

> "Neither Contracting Party shall in its territory subject investments or returns of investors or companies of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own investors or companies or to investments or returns of nationals or companies of any third State."[59]

58. In other instances the obligation to provide MFN treatment is linked to the obligation to provide fair and equitable treatment. For example, the China-Peru agreement of 9 June 1994 provides:

> "Investments and activities associated with investments of investors of either Contracting Party shall be accorded fair and equitable treatment and shall enjoy protection in the territory of the other Contracting Party.
>
> The treatment and protection referred to in Paragraph 1 of this Article shall not be less favourable than that accorded to investments and activities associated with such investments of investors of a third State."[60]

59. Notwithstanding the common obligation of MFN treatment in bilateral investment treaties, the way in which that obligation is expressed varies. In this regard, six types of obligation can be identified although some agreements may mix the different types of obligation within a single MFN clause.

60. The first type is where the MFN obligation relates simply to "treatment" accorded to the investor or the investments. The Austria-Czech and Slovak Republics agreement is an example of this.

61. The second type of obligation is where the scope of the treatment to be provided has been broadened by referring to "all" treatment. One example of this is the Argentina-Spain

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[58] Agreement between the Republic of Austria and the Czech and Slovak Federal Republic Concerning the Promotion and Protection of Investments, done in Vienna on 15 October 1990, United Nations, *Treaty Series*, vol. 1653, No. 28433, p. 127 at art. 3 (1).

[59] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the promotion and protection of investments, done in London on 11 December 1990, at art. 3 (1), available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/126>.

[60] Agreement between the Government of the Republic of Peru and the Government of the People's Republic of China concerning the encouragement and reciprocal protection of investments, done in Beijing on 9 June 1994, at arts.3 (1), 3 (2), available at <http://investmentpolicyhub.unctad.org/IIA/country/42/treaty/954>.

agreement, which specifies that the MFN provision applies "[i]n all matters governed by this Agreement."[61]

62. The third type of obligation is where the term "treatment" is related to specific aspects of the investment process, such as "management," "maintenance," "use," and "disposal" of the investment to which MFN treatment applies.[62] In some instances agreements provide for MFN treatment in respect of the "establishment" of investment, thus providing protection for both the pre-investment period as well as the post-investment period.[63]

63. The fourth type consists of those cases where MFN treatment is related to specific obligations under the treaty, such as the obligation to provide fair and equitable treatment.

64. The fifth type of obligation is where MFN treatment is to be provided only to those investors or investments that are "in like circumstances"[64] or "in similar situations"[65] to investors or investments with which a comparison is being made.

65. A sixth type consists of those agreements where a territorial limitation appears to have been introduced. For example, the Italy-Jordan agreement of 21 July 1996 provides that the contracting parties agree to provide MFN treatment "within the bounds of their own territory."[66]

66. MFN provisions in investment agreements usually provide as well for exceptions where the obligation to provide MFN treatment does not apply. The most common exceptions relate to taxation, government procurement, or benefits that one party obtains through being party to a customs union.[67]

C. Interpretative issues relating to MFN provisions in investment agreements

67. It is widely accepted by investment dispute settlement tribunals that MFN clauses, as treaty provisions, must be interpreted in accordance with the rules of treaty interpretation embodied in articles 31 and 32 of the VCLT. However, controversies over the interpretation

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[61] Agreement on the reciprocal promotion and protection of investments, done at Buenos Aries on 3 October 1991, United Nations, *Treaty Series*, vol. 1699, No. 29403, p. 187.

[62] NAFTA provides for MFN treatment in respect of "the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments." NAFTA, art. 1103.

[63] *Ibid.*

[64] *Ibid.*

[65] Agreement between the Republic of Turkey and Turkmenistan concerning the reciprocal promotion and protection of investments, done at Ashgabat on 2 May 1992, at art. II, available at <http://investorstatelawguide.com/documents/documents/BIT-0335%20-%20Turkey%20-%20Turkmenistan%20(1992)%20[English].pdf>.

[66] Agreement between the Government of the Hashemite Kingdom of Jordan and the Government of the Italian Republic on the promotion and protection of investments, done at Amman on 21 July 1996, available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1681>.

[67] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the promotion and protection of investments, done in London on 11 December 1990, at article 7, available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/126>. See OECD, "Most Favoured Nation Treatment in International Law" *OECD Working Papers on International Investment*, vol. 2 (2004), p. 5.

of MFN provisions sometimes reflect an underlying difference in the application of the VCLT provisions.[68]

68. Notwithstanding the variations in the wording of MFN clauses, there are interpretative issues that are common to all such clauses, whether in the field of trade, investment, or services. There are three aspects of MFN provisions that have given rise to interpretative issues, which will be dealt with below in turn: defining the beneficiary of an MFN clause, defining the necessary treatment, and defining the scope of the clause. Of these three major interpretative questions, only the scope of the "treatment" to be provided under an MFN provision has been subject to significant discussion and dispute before investment tribunals.

1. Who is entitled to the benefit of an MFN provision?

69. The first interpretative issue is that of defining the beneficiaries of an MFN clause. In 1978, the Commission described entitlement to the benefit of an MFN provision as accruing "to the beneficiary State or to persons or things in a determined relationship with that State." In bilateral investment agreements, the obligation is generally specified as providing MFN treatment to the "investor" or its "investment." Some agreements limit the benefit of an MFN provision to the investment.[69] However, while some investment agreements say no more than that, others qualify the beneficiary as having to be an investor or investment that is "in like circumstances" or in a "similar situation" to the comparator.

70. This has led to considerable controversy over what constitutes an "investment," in particular whether an investment must make a contribution to the host State's economic development.[70] However, the definition of investment is a matter relevant to the investment agreement as a whole and does not raise any systemic issues about MFN provisions or about their interpretation. Accordingly, the Study Group did not see any need to consider this matter further.

71. The term "in like circumstances" is found in the investment chapter of the North American Free Trade Agreement (NAFTA), but is not included in many other agreements. The words seem to place some limitation upon which investors or investments can claim the benefit of an MFN provision – suggesting perhaps that only those investors or investments that are in "like circumstances" with those of the comparator treaty can do so.

72. The question arises whether in fact the inclusion of the qualification of "in like circumstances" adds anything to an MFN clause. Under the *ejusdem generis* principle a claim to MFN can in any event only be applied in respect of the same subject matter and in respect of those in the same relationship with the comparator. This is the effect of 1978 draft articles 9 and 10.

73. In the MAI negotiations, the parties were divided precisely on this point, and thus there was never agreement on whether to include the words "in like circumstances" in the negotiating text. The practical importance of this issue is whether interpretations of agreements that contain the words "in like circumstances" are relevant to the interpretation of agreements that do not contain such terminology. As noted below, there are dangers in

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[68] See paras. 174–193 *infra*.

[69] The Energy Charter Treaty (Annex 1 To The Final Act Of The European Energy Charter Conference), done at Lisbon on 17 December 1994, United Nations, *Treaty Series*, vol. 2080, p. 95 at art. 10 (7).

[70] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, Decision on Jurisdiction, ICSID Case No. ARB/02/13 (9 November 2004), para. 112 (Italy-Jordan BIT); and more recently, *Standard Chartered Bank v. United Republic of Tanzania*, Award, ICSID Case No. ARB/10/12, November 2, 2012.

adopting interpretations of one investment agreement as applicable automatically to other agreements, and this is even more so where the wording of the two agreements is different.

2. What constitutes treatment that is "no less favourable"?

74. The second interpretative issue is that of determining what constitutes treatment that is "no less favourable." The Commission in 1978 had little to say about this matter, apart from explaining why the term "no less favourable" was used rather than the term "equal" and that treatment could be no less favourable if the comparator does not actually receive the treatment but nonetheless is entitled to receive it.[71] To some extent, this question is related to third issue, determining the scope of treatment.

75. One view is that the rationale for granting "no less favourable" treatment is the desire of the beneficiary State to ensure that there is equality of competitive opportunities between its own nationals and those of third States.[72] This is the rationale for providing MFN in respect of trade in goods under GATT and the WTO, and the same rationale is fundamental for investors and their investments. An alternative view is that the objective of MFN and national treatment is to recognize and give effect to "rights" of investors."[73] Even so, the purpose of a "right" in the context of MFN and national treatment is to ensure that an investor has equality of competitive opportunities with other foreign investors or with nationals as the case may be.

76. Where the "no less favourable" provision provides a link with "national treatment" provisions, the granting State agrees to provide treatment "no less favourable" than that which it provides to its own nationals. Such provision of national treatment has the same *ejusdem generis* problem of determining sufficient similarity between subject matters. Equally, national treatment provisions, like MFN provisions, often use the term "in like circumstances" or "in similar situations" to define the scope of the entitlement of a beneficiary of a national treatment provision. Thus, both clauses give rise to similar interpretative questions.

77. The 1978 draft articles had little to say about the link between MFN and national treatment. It provided that the two could stand together in one instrument without affecting MFN treatment.[74] It also provided that MFN treatment applied even if the treatment granted to the third State was granted as national treatment. In the view of the Study Group, interpretations of phrases such as "in like circumstances" or "in similar situations" in the context of national treatment can provide important guidance for the interpretation of those terms in the context of MFN clauses.

78. The meaning of "no less favourable" has not been the subject of much controversy in investment disputes involving MFN treatment. In the MAI negotiations there was some suggestion that the term "equal to" should be used as the standard for treatment under the MFN provision instead of "no less favourable" treatment. Although the matter was never finally resolved, the counterargument was that an MFN provision is not intended to limit the granting State in what it can provide. It may provide better than "equal" treatment if it wishes, although that may have implications for its other MFN agreements. "No less favourable" provides a floor for the treatment to be provided.

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[71] See commentary to draft art. 5, *Yearbook ... 1978*, vol. II (Part Two), p. 21.

[72] Todd Weiler, *The Interpretation Of International Investment Law: Equality, Discrimination, and Minimum Standards Of Treatment In Historical Context* (Leiden: Martinus Nijhoff Publishers, 2013), pp. 415–416.

[73] DiMascio and Pauwelyn.

[74] *Yearbook ... 1978*, vol. II (Part Two), p. 51 (draft art. 19).

3. What is the scope of the treatment to be provided under an MFN clause?

79. The final interpretative issue is the scope of the right being accorded under an MFN clause. In other words, what does "treatment" encompass? This question was identified by the Commission in 1978 in article 9 of the draft articles when it provided that an MFN clause applies to "only those rights that fall within the subject matter of the clause."[75] This, as the Commission pointed out in its commentary, is known as the *ejusdem generis* rule.[76]

80. The question of the scope of the treatment to be provided under an MFN provision has become one of the most vexed interpretative issues under international investment agreements. The problem concerns the applicability of an MFN clause to procedural provisions, as distinct from the substantive provisions of a treaty. It also involves the larger question of whether any rights contained in a treaty with a third State, which are more beneficial to an investor, could be relied upon by such an investor by virtue of the MFN clause.

81. MFN clauses in a basic treaty have been invoked to expand the scope of the treaty's dispute settlement provisions in several ways. These include: (a) to invoke a dispute settlement process not available under the basic treaty; (b) to broaden the jurisdictional scope where the basic treaty restricted the ambit of the dispute settlement clause to a specific category of disputes, such as disputes relating to compensation for expropriation; and (c) to override the applicability of a provision requiring the submission of a dispute to a domestic court for a "waiting period" of 18 months, prior to submission to international arbitration. It is in this third circumstance that MFN has been most commonly invoked, thus, particular attention will be given to this it.

(a) MFN and procedural matters: origins of the issue

82. The origins of the use of MFN in respect of access to procedural matters is often traced back to the 1956 arbitral award in the *Ambatielos* claim[77] where it was held that the "administration of justice" was an important part of the rights of traders and thus by virtue of the MFN clause should be treated as included within the phrase "all matters relating to commerce and navigation."[78]

83. Almost 45 years later the matter came to the fore again in *Maffezini v. The Kingdom of Spain*[79] where the tribunal accepted the claimant's argument that it could invoke the MFN clause in the 1991 Argentina-Spain Bilateral Investment Treaty (BIT), in order to ignore the requirement of an 18-month waiting period before bringing a claim under the BIT. The claimant relied instead on the 1991 Spain-Chile BIT, which did not include such a requirement and allowed an investor to opt for international arbitration after six months.[80] The MFN clause in the Argentina-Spain BIT provided:

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[75] *Ibid.*, p. 27 (text of draft article 9).

[76] *Ibid.* (commentary to draft arts. 9 and 10).

[77] *The Ambatielios Claim (Greece v. United Kingdom of Great Britain and Northern Ireland), United Nations Reports of International Arbitral Awards*, vol. XII, p. 83.

[78] *Ibid.*, p. 107.

[79] *Emilio Agustin Maffezini v. Kingdom of Spain*, Decision of the Tribunal on Objections to Jurisdiction, ICSID Case No. ARB 97/7 (25 January 2000), *ICSID Reports*, vol. 5, p. 396.

[80] *Ibid.*, para. 39.

> "In all matters governed by this Agreement, this treatment shall be not less favourable than that extended by each Party to the investments made in its territory by investors of a third country."[81]

84. In upholding the claimant's argument, the tribunal took into account the broad terms of the MFN clause, which applied "in all matters governed by this Agreement." It placed emphasis on the need to identify the intention of the contracting parties, the importance of assessing the past practice of States concerning the inclusion of the MFN clause in other BITs (the assessment of which favoured the claimant's argument), and the significance of taking into account public policy considerations.

85. The tribunal relied in particular on the *Ambatielos* claim[82] where the Commission of Arbitration had confirmed the relevance of the *ejusdem generis* principle. The Commission stated that an MFN clause can only attract matters belonging to the same category of subject matter and that "the question can only be determined in accordance with the intention of the Contracting Parties as deduced from a reasonable interpretation of the Treaty."[83]

86. In respect of the *ejusdem generis* principle, the *Maffezini* tribunal took the view that dispute settlement arrangements, in the current economic context, are inextricably related to the protection of foreign investors, and that dispute settlement is an extremely important device which protects investors. Therefore, such arrangements were not to be considered as mere procedural devices but arrangements designed to better protect the rights of investors by recourse to international arbitration.

87. From this, the tribunal concluded that,

> "... if a third party treaty contains provisions for the settlement of disputes that are more favourable to the protection of the investor's rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favoured nation clause as they are fully compatible with the *ejusdem generis* principle"[84]

88. This application of the MFN clause to dispute settlement arrangements would, in the view of the tribunal, result in the "harmonization and enlargement of the scope of such arrangements."[85] However, the tribunal was conscious of the fact that its interpretation of the MFN clause was a broad one, and could give rise, inter alia, to "disruptive treaty shopping."[86] It noted that,

> "As a matter of principle, the beneficiary of the clause should not be able to override public policy considerations that the contracting parties might have envisaged as fundamental conditions for their acceptance of the agreement in question, particularly if the beneficiary is a private investor, as will often be the case. The scope of the clause might thus be narrower than it appears at first sight."[87]

89. Thereafter, the tribunal went on to set out the four situations in which, in its view, an MFN provision could not be invoked:

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[81] Agreement on the reciprocal promotion and protection of investments, done at Buenos Aries on 3 October 1991, United Nations, *Treaty Series*, vol. 1699, No. 29403, p. 187 at art. IV.

[82] *Ibid.*, para. 49.

[83] *Ambatielos*, p. 107.

[84] *Maffezini*, para. 56.

[85] *Ibid.*, para. 62.

[86] *Ibid.*, para. 63.

[87] *Ibid.*, para. 62.

- where one Contracting Party had conditioned its consent to arbitration on the exhaustion of local remedies, because such a condition reflects a "fundamental rule of international law";
- where the parties had agreed to a dispute settlement arrangement which includes a so-called "fork in the road" provision, because to replace such a provision would upset the "finality of arrangements" that countries consider important as matters of public policy;
- where the agreement provides for a particular arbitration forum, such as the International Centre for Settlement of Investment Disputes (ICSID), and a party wishes to change to a different arbitration forum; and
- where the parties have agreed to a highly institutionalized system of arbitration that incorporates precise rules of procedure (e.g. NAFTA), because these very specific provisions reflect the precise will of the contracting parties.[88]

90. The tribunal also left open the possibility that "other elements of public policy limiting the operation of the clause will no doubt be identified by the parties or tribunals."[89]

(b) The subsequent interpretation by investment tribunals of MFN clauses in relation to procedural matters

91. Subsequent decisions of investment tribunals have been divided on whether to follow *Maffezini*. It has been widely recognized by investment tribunals, both explicitly and implicitly, that the question of the scope of MFN provisions in any given bilateral investment treaty is a matter of interpretation of that particular treaty.[90] Investment tribunals frequent cite articles 31 and 32 of the VCLT and principles such as *expressio unius exclusio alterius*. Tribunals assert that they are seeking to ascertain the intention of the parties. Yet there is no systematic approach to interpretation and different factors, sometimes unrelated to the words used in the treaties before them, appear to have been given weight.

92. The Study Group sought to identify factors that have appeared to influence investment tribunals in interpreting MFN clauses and to determine whether there were particular trends. In doing so, the Study Group was conscious of the need to reinforce respect for the rules of interpretation set out in the VCLT, which are applicable to all treaties. The most prominent factors that have influenced investment tribunals in their decisions regarding MFN application to procedural matters are set out below.

(i) The distinction between substantive and procedural obligations

93. A frequent starting point is for tribunals to determine whether, in principle, an MFN clause could relate to both procedural and substantive provisions of the treaty. In *Maffezini* the question posed was:

> "whether the provisions on dispute settlement contained in a third-party treaty can be considered to be reasonably related to the fair and equitable treatment to which the most favored nation clause applies under basic treaties on commerce, navigation or investments and, hence, whether they can be regarded as a subject matter covered by the clause."[91]

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[88] *Ibid.*, at para. 63.

[89] *Ibid.*

[90] *Salini; Siemens A.G. v. The Argentine Republic*, Decision on Jurisdiction, ICSID Case No. ARB/02/8 (3 August 2004) (Argentina-Germany BIT).

[91] *Maffezini*, para. 46.

94. As noted above, the tribunal concluded that MFN treatment could be extended to procedural provisions subject to certain "public policy" considerations.[92] In reaching that decision, the tribunal invoked the decision of the Commission of Arbitration in *Ambatielos* and said, "there are good reasons to conclude that today dispute settlement arrangements are inextricably related to the protection of foreign investors, as they are also related to the protection of rights of traders under treaties of commerce."[93]

95. Key to the decision in *Maffezini* is the conclusion that dispute settlement provisions are, in principle, part of the protection for investors and investments provided under bilateral investment agreements. Hence dispute settlement provisions by definition are almost always capable of being incorporated into an investment agreement by virtue of an MFN provision. Under an investment agreement, to use the language of article 9 of the 1978 draft articles, dispute settlement falls "within the limits of the subject matter" of an MFN clause.

96. The conclusion that procedural matters, specifically dispute settlement provisions, are by their very nature of the same category as substantive protections for foreign investors has been an important part of the reasoning in some subsequent decisions of investment tribunals. In *Siemens*, the tribunal stated that dispute settlement "is part of the protection offered under the Treaty. It is part of the treatment of foreign investors and investments and of the advantages accessible through an MFN clause."[94] The tribunal in *AWG* said that it could find "no basis for distinguishing dispute settlement matters from any other matters covered by a bilateral investment treaty."[95]

97. Nevertheless, some tribunals have queried whether dispute settlement provisions are inherently covered by MFN clauses. The *Salini* tribunal doubted that the *Ambatielos* decision was an authority for such a proposition,[96] citing the views of the dissenting judges in the prior International Court of Justice decision to the effect that "commerce and navigation" did not include the "administration of justice."[97] The *Salini* tribunal further pointed out that, in any event, when the Commission of Arbitration in *Ambatielos* referred to the "administration of justice," it was referring not to procedural provisions or dispute settlement, but rather to substantive provisions under other investment treaties relating to the treatment of nationals in accordance with justice and equity.[98]

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[92] *Ibid.*, para. 56.

[93] *Ibid.*, para. 54.

[94] *Siemens*, para. 102.

[95] *AWG Group Ltd. v. The Argentine Republic*, Decision on Jurisdiction, UNCITRAL (3 August 2006), para. 59 (Argentina-UK BIT) available at <http://www.italaw.com/cases/106>. See also *National Grid, plc v. The Argentine Republic*, Decision on Jurisdiction, UNCITRAL (20 June 2006), para. 89 (Argentina-UK BIT) available at <http://www.italaw.com/cases/732>; *Gas Natural SDG, S.A. v. The Argentine Republic*, Decision on Jurisdiction, ICSID Case No. ARB/03/10 (17 June 2005), para. 29 (Argentina-Spain BIT); *RosInvest Co. UK Ltd. v. The Russian Federation*, Award on Jurisdiction, SCC Case No. V079/2005 (1 October 2007), paras. 131–132 (UK-USSR BIT); *Renta 4 S.V.S.A, Ahorro Corporación Emergentes F.I., Ahorro Corporación Eurofondo F.I., Rovime Inversiones SICAV S.A., Quasar de Valors SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. v. The Russian Federation*, Award on Preliminary Objections, SCC No. 24/2007 (20 March 2009), para. 100 (Spain/Russia BIT); *Austrian Airlines v. The Slovak Republic*, final award, UNCITRAL (9 October 2009), para. 124 (Austria-Czech/Slovak Republic BIT) available at <http://www.italaw.com/cases/103>.

[96] *Salini*, para. 112; see also *Vladimir Berschader and Moïse Berschader v. The Russian Federation*, SCC Case No. 080/2004 (21 April 2006), para. 175 (Belgium/Luxembourg-USSR BIT).

[97] *Salini*, para. 106. *Ambatielos (Greece v. United Kingdom), Merits: Obligation to Arbitrate*, Judgment of 19 May 1953, *I.C.J. Reports 1953*, p. 10.

[98] *Ibid.*, at paras. 111–112.

98. The *Telenor* tribunal was more emphatic about the exclusion of procedural provisions from the application of an MFN clause, stating:

> "In the absence of language or context to express the contrary, the ordinary meaning of 'investments shall be accorded treatment no less favourable that that accorded to investments made by investors of any third state' is that investor's *substantive* rights in respect of the investment are to be treated no less favourably under a BIT between the host state and a third state, and there is no warrant for interpreting the above phrase to include procedural rights as well."[99]

99. The view that MFN clauses in investment treaties can, in theory, apply to both procedural and substantive matters does not mean that they will always be so applied.[100] However, in a number of cases tribunals have interpreted MFN provisions to encompass dispute settlement procedures on the basis that in principle MFN clauses do apply to both.

(ii) The interpretation of MFN provisions as a jurisdictional matter

100. A number of tribunals have been influenced by the view that an MFN provision cannot be applied to dispute settlement provisions if they relate to the jurisdiction of the tribunal. This has led to a divergence of views amongst tribunals in respect of two different issues. The first issue is whether jurisdictional matters require a stricter approach to interpretation. The second issue is whether the applicability of MFN to dispute settlement provisions concerns the jurisdiction of a tribunal.

1. Standard for interpreting jurisdictional matters

101. In *Plama*, the tribunal treated the question of the scope of an MFN clause as one of agreement to arbitrate, stating that "[i]t is a well established principle, both in domestic and international law, that such an agreement should be clear and unambiguous."[101] As a result, "the intention to incorporate dispute settlement provisions must be clearly and unambiguously expressed."[102] Therefore, the party seeking to apply an MFN clause to a question of jurisdiction bears the burden of proving such application was clearly intended – a high threshold to meet. This view was endorsed fully by the tribunal in *Telenor*[103] and is echoed in *Wintershall*.[104]

102. However, this approach has been met with considerable opposition. It was rejected in *Austrian Airlines*, and in *Suez*, where the tribunal said "dispute resolution provisions are subject to interpretation like any other provisions of a treaty, neither more restrictive nor

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[99] Emphasis in original. *Telenor Mobile Communications A.S. v. Hungary*, ICSID Case No. ARB/04/15 (13 September 2006), para. 92 (Norway-Hungary BIT).

[100] *Renta*, para. 100; *Austrian Airlines; ICS Inspection and Control Services Limited (United Kingdom) v. Republic of Argentina*, Award on Jurisdiction, UNCITRAL, PCA Case No. 2010-9 (10 February 2012), (UK/Argentina BIT).

[101] *Plama Consortium Limited v. Republic of Bulgaria*, Decision on Jurisdiction, ICSID Case No. ARB/03/24 (8 February 2005), para. 198 (Cyprus-Bulgaria BIT).

[102] *Ibid.*, at para. 204.

[103] *Telenor*, para. 91.

[104] *Wintershall Aktiengesellschaft v. Argentine Republic*, Award, ICSID Case No. ARB/04/14 (8 December 2008), para. 167 (Argentina-Germany BIT). The tribunal took the view that procedural provisions could not be included within the scope of an MFN provision unless "the MFN Clause in the basic treaty clearly and unambiguously indicates that it should be so interpreted: which is not so in the present case."

more liberal."[105] Jurisdictional clauses, the tribunal said, must be interpreted as any other provision of a treaty, on the basis of the rules of interpretation set out in articles 31 and 32 of the VCLT.[106]

103. The view that because the application of MFN to dispute settlement matters is a question of jurisdiction there is a higher burden on a party seeking to invoke an MFN provision has found little support in the decisions of more recent investment tribunals, although it has been endorsed by at least some commentators.[107] Those opposing the approach have also claimed that it is inconsistent with general international law on the interpretation of jurisdictional provisions. However, the *ICS* tribunal has suggested that the *Plama* tribunal was not establishing a jurisdictional rule; it was simply pointing out that consent to jurisdiction could not be assumed.[108]

2. Dispute settlement and jurisdiction

104. Tribunals more recently have given renewed attention to the question of whether the application of MFN clauses to dispute settlement provisions affects the jurisdiction of a tribunal. Substantive rights and procedural rights are different in international law, it is argued, because unlike domestic law a substantive right does not automatically carry with it a procedural right to compel enforcement.[109] The fact that a State is bound by a substantive obligation does not mean that it can be compelled to have that obligation adjudicated. The right to compel adjudication requires an additional acceptance of the jurisdiction of the adjudicating tribunal.[110]

105. Under this view, in order to enforce substantive rights under the BIT, a claimant has to meet the requirements *ratione materiae*, *ratione personae* and *ratione temporis* for the exercise of jurisdiction by a dispute settlement tribunal. For, example, an individual that does not meet the criteria under a BIT to be an investor cannot become an investor by invoking an MFN provision.[111] Just as MFN cannot be used to change the conditions for the exercise of substantive rights, MFN cannot be used to change the conditions for the exercise of procedural or jurisdictional rights. An investor who has not met the requirements for commencing a claim against the respondent State cannot avoid those requirements by invoking the procedural provisions of another BIT.

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[105] *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, Decision on Jurisdiction, ICSID Case No. ARB/03/17 (16 May 2006), para. 64 (France-Argentina and Spain-Argentina BITs).

[106] *Austrian Airlines*, para. 95. The tribunal also placed reliance on the statement in the separate opinion of Judge Higgins in the *Oil Platforms* case that there is no support in the jurisprudence of the PCIJ or the ICJ for a restrictive approach to the interpretation of compromissory clauses, and in fact no policy of being either liberal or strict in their interpretation: *Oil Platforms (Islamic Republic of Iran v. United States of America) Preliminary Objections*, Judgment of 12 December 1996, Separate Opinion by Judge Higgins, *I.C.J. Reports 1996*, p. 857 at para. 35, cited in *Austrian Airlines* at para. 120.

[107] Campbell MacLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford: Oxford University Press, 2008), para. 7.168.

[108] *ICS v. Argentina*, paras. 281-2.

[109] *Impregilo S.p.A. v. Argentine Republic*, Concurring and Dissenting Opinion of Professor Brigitte Stern, ICSID Case No. ARB/07/17 (21 June 2011).

[110] *Ibid.*

[111] Indeed, this position seems to have been accepted by the tribunal in *HICEE B.V. v. The Slovak Republic*, Partial Award, UNCITRAL, PCA Case No. 2009-11 (23 May 2011), para. 149 (Netherlands/Czech and Slovak Republic BIT).

106. The matter has also been put in terms of consent to arbitration.[112] A tribunal's jurisdiction is formed by the conditions set out in the relevant investment agreement stipulating the basis on which the respondent State has consented to the exercise of jurisdiction by the tribunal. Compliance by the claimant investor with those conditions is essential for a tribunal to exercise jurisdiction over the dispute. Unless a respondent State waives the application of the conditions of its consent to the exercise of jurisdiction, a tribunal has no jurisdiction to hear a claim even though the claimant is an investor within the meaning of the BIT in question. On that basis MFN cannot be used to change the basis for exercising jurisdiction.

107. Support for the view that the matter is one of jurisdiction has come from the decision of the tribunal in *ICS v. Argentina*, which relies in part on the statement of the International Court of Justice in *Democratic Republic of Congo v. Rwanda*,[113] that when

> "consent is expressed in a compromissory clause in an international agreement, any conditions to which such consent is subject must be regarded as constituting the limits thereon. The Court accordingly considers that the examination of such conditions relates to its jurisdiction and not to the admissibility of the application."[114]

108. The *ICS* tribunal concluded that the 18-month litigation requirement in the BIT was a prerequisite to Argentina's acceptance of a claim being brought before the tribunal and that "failure to respect the pre-condition to the Respondent's consent to arbitrate cannot but lead to the conclusion that the Tribunal lacks jurisdiction over the present dispute."[115]

109. In deciding whether the 18-month litigation requirement was a matter relating to jurisdiction, the ICS tribunal looked at the meaning of the word "treatment" in article 3 (2) of the UK-Argentine BIT. It accepted that "treatment" can have a broad meaning and that there is no inherent limitation to substantive matters. However, applying what it referred to as the principle of "contemporaneity in treaty interpretation,"[116] the tribunal considered what the parties would have understood by the term at the time of the conclusion of the BIT. In the light of the jurisprudence of the time, and the World Bank draft guidelines on the treatment of foreign direct investment, the tribunal concluded that the parties were most likely to have considered that the term "treatment" related only to substantive obligations.

110. The *ICS* tribunal also pointed to: (a) the limitation of MFN treatment under the BIT to the "management, maintenance, use, enjoyment or disposal" of investments; (b) the limitation of the MFN provision to treatment by the host State "within its territory"; (c) the fact that exceptions to MFN treatment under the BIT relate to substantive matters only; and (d) the potential pointlessness (lack of *effet utile*) of including an 18-month litigation requirement in a treaty when the contracting party had already concluded treaties with no such requirement and thus the 18-month litigation requirement would have been rendered nugatory from the outset by the application of an MFN provision. All of these factors, the tribunal concluded, indicated that the parties could not have had the intention when

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[112] Dissenting Opinion of arbitrator Christopher Thomas in *Hochtief AG v. The Argentine Republic*, Decision on Jurisdiction, ICSID Case No. ARB/07/31 (24 October 2011), (Germany/Argentina BIT).

[113] *Case Concerning the Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Judgment of 3 February 2006, *I.C.J. Reports 2006*, p. 6 at para. 88.

[114] *ICS v. Argentina*, para. 258.

[115] *Ibid.*, at para. 362.

[116] *Ibid.*, at para. 289.

concluding the UK-Argentina BIT to include international dispute settlement provisions within the realm of the application of the MFN clause.[117]

111. The approach taken in ICS was reiterated in *Daimler Financial Services AG v. Argentine Republic*[118] where the tribunal concluded that the 18-month delay requirement was a condition precedent to the exercise of jurisdiction. Accordingly, it could not be modified by the application of MFN. A similar result was reached in *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*,[119] where the tribunal took the view that the respondent State's consent to arbitration was conditioned on the fulfillment of the conditions stated in the BIT, including an 18-month delay requirement. Since failure to comply with such a provision had the effect of denying jurisdiction, the matter could not be cured by the application of an MFN provision. Similarly, in *ST-AD GmbH (Germany) v. Republic of Bulgaria*,[120] non-compliance with the 18-month delay requirement was also found to deprive the tribunal of jurisdiction.

112. However, the tribunal in *Hochtief* took the view that an 18-month domestic litigation requirement is not a matter of jurisdiction.[121] Rather, it is a matter of admissibility – something that could be raised as an objection by a party to the dispute, but need not be. The tribunal distinguished between a provision affecting a right to bring a claim (jurisdiction) and a provision affecting the way in which a claim has to be brought (admissibility). Thus, the fact that the claimant had ignored the 18-month litigation requirement under the Germany-Argentina BIT and relied instead on the dispute settlement provisions of the Argentina-Chile BIT did not affect its jurisdiction.[122]

113. In *Teinver*[123] the tribunal upheld the application of an MFN provision to both an 18-month delay requirement and a 6-month negotiating period. The tribunal considered these provisions as relevant to admissibility and not to jurisdiction. However, it appeared to be done on the basis of an UNCTAD report on MFN clauses,[124] which called cases relating to the 18-month litigation requirement as admissibility cases and other cases where an MFN clause was invoked in relation to dispute settlement as "scope of jurisdiction" cases. But there is no explanation in the UNCTAD report as to why it treats cases relating to the 18-month litigation requirement as concerning admissibility rather than as concerning jurisdiction.

114. The cases that have not allowed the 18-month requirement to be set aside share a common approach. There has to be evidence that the MFN provision was designed to apply to change the jurisdictional limitations on the tribunal because the host State's consent was predicated on compliance with those limitations. Indeed, the implicit effect is to require

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[117] *Ibid.*, at para. 326. The tribunal accepted that domestic dispute settlement was covered by the MFN provision since it took place within the territory of the host State.

[118] *Daimler Financial Services AG v. Argentine Republic*, Award, ICSID Case No. ARB/05/1, 22 August 2012. The decision was by majority with one arbitrator dissenting.

[119] *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, Decision on Article VII.2 of the Turkey-Turkmenistan Bilateral Investment Treaty, ICSID Case No. ARB/10/1, 7 May 2002.

[120] *ST-AD GmbH v. Republic of Bulgaria*, Award on Jurisdiction, UNCITRAL PCA Case No. 2011-06, 18 July 2013.

[121] *Hochtief* (majority opinion).

[122] *Ibid.*

[123] *Teinver S.A., Transportes de Cercanias S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, Decision on Jurisdiction, ICSID Case No. ARB/09/01, December 21, 2012.

[124] UNCTAD Series on International Investment Agreements vol. II, *Most Favoured-Nation Treatment*, 24 January 2011, document UNCTAD/DIAE/IA/2010/1, at pp. 66–67.

"clear and unambiguous" evidence of intent to alter the jurisdiction of a tribunal, reinstating the *Plama* approach, although for different reasons.

(iii) The specific intent of other treaty provisions

115. In some cases, when interpreting MFN provisions, tribunals have taken into account the fact that the benefit sought to be obtained from the other treaty has already been covered, in a different and more specific way, in the basic treaty itself. In a sense, this is at the very core of what MFN is about: it seeks to provide something better than what the beneficiary would otherwise receive under the basic treaty. On that basis, it would seem inevitable that if the basic treaty provides for a certain kind of treatment, the consequence of the application of an MFN clause is that the treaty provision in the basic treaty would be overridden.

116. In *RosInvest*, the tribunal took the view that the fact that the operation of the MFN provision would broaden the scope of the jurisdiction of the tribunal was "a normal result of the application of MFN clauses, the very character and intention of which is that protection not accepted in one treaty is widened by transferring the protection accorded in another treaty."[125]

117. However, the contrary view has also been taken. In the *CME* case, the dissenting arbitrator, Ian Brownlie, was not prepared to use an MFN clause to import into the treaty an alternative formula for compensation, for this would render nugatory the express provision in the treaty for compensation.[126] In *Austrian Airlines* the tribunal considered that the particular provisions of the treaty relating to jurisdiction were themselves a clear indication that the parties did not intend to allow the jurisdiction of the tribunal to be expanded by means of an MFN provision. In the view of the tribunal, the specific intent of those provisions was not to be overridden by the general intent of the MFN provision.[127] The tribunal reinforced this conclusion by looking at the negotiating history of the Austria-Slovakia BIT where a wider formulation of the tribunal's jurisdiction had been rejected. In *Berschader*, the tribunal looked at other provisions of the treaty in order to show that there were some provisions to which the MFN clause could not apply, and thus the expression "all matters covered by the present Treaty" could not be taken literally.[128]

118. In *Austrian Airlines* the tribunal also considered the MFN provision in the context of the other provisions of the treaty, placing emphasis on the fact that the treaty itself provided specifically for a limited scope to arbitration. In the view of the tribunal, given that there was in the treaty a "manifest and specific intent" to limit arbitration to disputes over the amount of compensation as opposed to disputes over the principle of compensation, "it would be paradoxical to invalidate that specific intent by reference to the general, unspecific intent expressed in the MFN clause."[129] The *Tza Yap Shum* tribunal also took the view that the general intent of an MFN provision must give way to the specific intent as set out in a particular provision in the basic treaty.[130]

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[125] *RosInvest*, para. 131. In *Renta*, para. 92, the tribunal stated "the extension of commitments is in the very nature of MFN clauses."

[126] *CME Czech Republic B.V. v. The Czech Republic*, Separate Opinion on the Issues at the Quantum phases, UNCITRAL (14 March 2003), para. 11 (Netherlands-Czech Republic BIT) available at <http://italaw.com/cases/documents/282>.

[127] *Austrian Airlines*, para. 137.

[128] *Berschader*, para. 192.

[129] *Austrian Airlines*, para. 135.

[130] *Señor Tza Yap Shum v. The Republic of Peru*, Decision on Jurisdiction and Competence (Spanish), ICSID Case No. ARB/07/6 (19 June 2009) at para. 220 (Peru-China BIT).

(iv) The practice of the parties

119. The other treaty-making practice of the parties to the BIT, in respect of which an MFN claim has been made, has been referred to by some tribunals as a means to ascertain the intention of the parties regarding the scope of the MFN clause. In *Maffezini* the tribunal reviewed the BIT treaty-making practice of Spain, noting that Spanish practice was to allow disputes to be brought without the 18-month requirement imposed in the Argentina-Spain BIT. The tribunal also noted that the Argentina-Spain BIT was the only Spanish BIT that used the broad language "in all matters governed by this Agreement" in its MFN clause.[131] However, the tribunal did not make clear either the legal relevance of this subsequent practice of the parties or the interpretational justification for referring to it.

120. In *Telenor*,[132] the tribunal regarded the practice of the parties as relevant in a somewhat different way. The fact that Hungary had concluded other BITs that did not limit the scope of arbitration led the tribunal to conclude that a limited scope for arbitration in the BIT between Hungary and Norway was indeed intended. Thus the MFN clause could not be used to expand the scope of arbitration.

121. In *Austrian Airlines*, the tribunal relied on the other treaty practice of Slovakia to confirm its conclusion.[133] In contrast, the tribunal in *Renta* declined to consider the practice of Russia in its other BITs, noting that since its decision was based on the text of the BIT before it, practice under other BITs could not supplant that text.[134]

122. It is not clear on what legal basis tribunals justify making reference to the subsequent practice of one State alone. Is it a Vienna Convention-based aid to interpretation or is it an independent form of verification of some implicit intent of the parties, or at least of the party against which the claim is being made? In *Plama* the tribunal stated: "It is true that treaties between one of the Contracting Parties and third States may be taken into account for the purpose of clarifying the meaning of a treaty's text at the time it was entered into."[135] However, the tribunal does not indicate the basis on which it considered that treaties concluded by a State with a third party are relevant to the interpretation of a treaty between that State and another State, although it may have been relying implicitly on article 32 of the VCLT.

(v) The relevant time for determining the intention of the parties

123. Most tribunals have not considered the time at which the intention of the parties to a BIT should be ascertained. However, in *ICS* the tribunal addressed the issue specifically, indicating that the relevant time was at the conclusion of the treaty and interpreted the term "treatment" on the basis of its meaning at that time.[136] According to the tribunal, the principle of "contemporaneity" in treaty interpretation must be applied. Although no tribunal has explicitly disagreed with this position, tribunals prior to *ICS* had not looked explicitly at the meaning of an MFN clause at the date the treaty was concluded. They had looked at preparatory work but in the absence of any indication in the *travaux préparatoires* the MFN clause was interpreted without any reference to whether it was being given a contemporaneous or a present-day meaning.

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[131] *Maffezini*, para. 57.
[132] *Telenor*.
[133] *Austrian Airlines*, para. 134.
[134] *Renta*, para. 120.
[135] *Plama*, para. 195.
[136] *ICS v. Argentina*, para. 289.

(vi) The content of the provision to be changed by invoking by an MFN provision

124. The question arises whether the content of the provision in the basic treaty that is to be affected has had an influence on the willingness of tribunals to allow an MFN clause to be invoked. In this regard, it is noteworthy that of the 18 cases so far where an MFN provision has been invoked successfully, 12 have related to the same provision, an obligation to submit a claim to the domestic courts and to litigate for 18 months before invoking dispute settlement under the BIT. In each case, the effect of the MFN provision was to relieve the claimant from the obligation to litigate domestically for that 18-month period. These cases involved BITs entered into by Argentina with Germany, Spain, and the United Kingdom. Although the substantive effect of the 18-month litigation requirement was the same, the MFN provisions invoked were not worded in the same way.

125. The view that the nature of the provision in the basic treaty might have influenced the outcome was hinted at in *Plama*, where the tribunal (not dealing with an 18-month domestic litigation requirement) said that the decision in *Maffezini* was "understandable" since it was attempting to neutralize a provision that was "nonsensical from a practical point of view."[137]

126. In *Abaclat v. Argentina*,[138] the tribunal took the view that delaying the right of an investor to bring a claim for 18 months was inconsistent with the express objective of the BIT of providing expeditious dispute settlement and therefore could be ignored by the claimant. This view was rejected, however, by the tribunal in *ICS v. Argentina*. A tribunal, the *ICS* tribunal said, cannot "create exceptions to treaty rules where these are merely based upon an assessment of the wisdom of the policy in question."[139]

127. Attempts to use MFN to add other kinds of dispute settlement provisions, going beyond an 18-month litigation delay, have generally been unsuccessful. In *Salini*, an MFN provision was invoked to change the dispute settlement procedure for contract disputes. In *Plama*, an MFN provision was invoked to change the dispute settlement process from *ad hoc* arbitration to ICSID dispute settlement. These, then, were efforts to change one form of arbitration for another, yet both tribunals rejected them.

128. Conversely, one tribunal has allowed a claimant to invoke MFN to substitute one form of dispute settlement for another. In *Garanti Kos LLP v. Turkmenistan*,[140] the tribunal decided that where resort to ICSID arbitration under the UK-Turkmenistan BIT was available only with the consent of the Respondent, which it had not given, consent to ICSID arbitration could be found under other BITs entered into by Turkmenistan and imported into the UK-Turkmenistan BIT through the application of MFN. As a result, arbitration under the UNCITRAL rules, which was the fall-back position under UK-Turkmenistan BIT

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[137] *Plama*, para. 224. However, it is not clear why the 18-month domestic litigation provision was regarded as nonsensical. It provided an opportunity for the matter to be resolved in the domestic courts – a limited form of exhaustion of local remedies requirement with a guarantee that the investor could not be delayed beyond 18 months.

[138] The majority in *Abaclat* did not deal with an MFN claim. However, the tribunal did deal with the 18-month litigation requirement under the heading of "Admissibility of the Claim." *Abaclat and Others v. Argentine Republic (Case formerly known as Giovanna a Beccara and Others)*, Decision on Jurisdiction and Admissibility, ICSID Case No. ARB/07/5 (4 August 2011), (Italy-Argentina BIT). The contrary view was expressed in the dissent of arbitrator Georges Abi-Saab, at paras. 31–33.

[139] Furthermore, the *ICS* tribunal said, there was no proof before it that could lead it to the conclusion that the Argentine courts would be ineffective in dealing with the matter. *ICS v. Argentina*, paras. 267–269. See also the dissenting opinion of arbitrator J. Christopher Thomas in *Hochtief*.

[140] *Garanti Kos LLP v. Turkmenistan*, Decision on the Objection to Jurisdiction, 3 July 2013, ICSID Case No. ARB/11/20, the decision was by majority. Arbitrator Laurence Boisson de Chazournes attached a dissenting view.

in the absence of agreement on another form of dispute settlement, was, by way of MFN, supplanted by ICSID arbitration.

129. However, even if the cases involving the 18-month domestic litigation requirement can be explained in part by a view that that the particular requirement was somewhat trivial, in fact the reasoning of the tribunals is not based on the relative importance of a provision with an 18-month domestic litigation requirement. As pointed out above, in many instances the reasoning was based on the assumption that MFN clauses in BITs by their very nature cover dispute settlement.

130. Other cases that have allowed MFN to be used to obtain the benefit of the provisions of third party treaties relate to substantive rather than procedural issues. In *RosInvest*, the tribunal considered that on the basis of the MFN clause in the UK-USSR BIT it had jurisdiction over the legality of an alleged expropriation and not just over the narrower question of matters relating to compensation, which is what the UK-USSR BIT had provided for.

131. However, two tribunals have rejected such a use of MFN. In *Renta* the majority of the tribunal was not prepared to interpret the MFN provision in the Spain-Russia agreement to allow claims beyond compensation for expropriation because in its view the MFN provision in question applied only to the granting of fair and equitable treatment.[141] The *Austrian Airlines* tribunal equally found, on the basis of the interpretation of the MFN clause, that it could not be expanded beyond the express grant of jurisdiction to deal with matters relating to compensation in the event of expropriation.[142]

132. In *MTD* the tribunal was prepared to broaden the scope of fair and equitable treatment under the Chile-Malaysia BIT by reference to fair and equitable treatment in the Chile-Denmark and Chile-Croatia BITs. However, it appeared that neither party challenged the ability of the tribunal to do this, although they did not agree on all of the implications of its having done so.[143]

133. Equally in *Telsim*,[144] the parties appeared to be in agreement that, as a result of the MFN provision, fair and equitable treatment under the Turkey-Kazakhstan BIT was to be interpreted in the light of the meaning of fair and equitable treatment found in other BITs to which Kazakhstan was a party. Further, in *Bayindir*,[145] there was no objection to the general principle that, as a result of the MFN clause, the content of "fair and equitable treatment" in the Turkey-Pakistan BIT had to be determined in the light of fair and equitable treatment provisions of other BITs entered into by Pakistan.

134. Only in one case did a tribunal make a substantive addition to the obligations of the parties on the basis of an MFN provision in the face of an objection by one party. In *CME*, a majority of the tribunal concluded that the term "just compensation" in the Netherlands-Czech Republic BIT should be interpreted to mean "fair market value", in part because it was prepared on the basis of the MFN provision to incorporate the concept of "fair market value" from the US-Czech Republic BIT.[146]

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[141] *Renta*, paras. 105–119.

[142] *Austrian Airlines*, paras. 138–139.

[143] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, Award, ICSID Case No. ARB/01/7, 25 May 2004.

[144] *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Kazakhstan*, Award, ICSID Case No. ARB/05/16 (29 July 2008), at paras. 581–587, 591–605 (Turkey-Kazakhstan BIT).

[145] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, Award, ICSID Case No. ARB/03/29 (27 August 2009), at para. 153 (Turkey-Pakistan BIT).

[146] *CME*, para. 500.

(vii) Consistency in decision-making

135. While tribunals have noted that there is no formal precedential value in decisions of other tribunals, the desire for consistency clearly has had an influence on decision-making. Few tribunals have stated this as explicitly as the majority in *Impregilo*:

> "Nevertheless, in cases where the MFN clause has referred to 'all matters' or 'any matter' regulated in the BIT, there has been near-unanimity in finding that the clause covered the dispute settlement rules. On this basis, the majority of the Tribunal reaches the conclusion that *Impregilo* is entitled to rely, in this respect, on the dispute settlement rules in the Argentina-US BIT."[147]

136. In effect, the majority was of the view that, at least with respect to broadly worded MFN clauses and a requirement of commencing an action and litigating for 18 months, the question of the applicability of an MFN clause had been resolved.

(viii) The definition of treatment "no less favourable"

137. The difficulty of determining which treatment is less favourable is illustrated where MFN is used to replace one form of dispute settlement with another. Some tribunals have questioned whether the correct comparison is being made when third party treaty provisions are being compared with basic treaty provisions.[148] If the basic treaty contains an 18-month litigation requirement, while the third party treaty has no 18-month litigation requirement but includes a fork in the road provision, is it correct that the third party treaty provides more favourable treatment? On the one hand, there is an 18-month delay before invoking the dispute settlement provisions of the BIT under the basic treaty, but the investor gets access to both domestic and international processes. On the other hand, the investor under the third party treaty gets access to international dispute settlement earlier but loses having both international and domestic dispute settlement available. Which treatment is the more favourable?

138. The *ICS* tribunal took the view that an investor relying on an MFN provision to avoid the 18-month litigation requirement would be subject to the fork in the road provision of the third party treaty.[149] The *Garanti Kos* tribunal took the view that it was difficult to say that ICSID arbitration was objectively more favourable than UNCITRAL arbitration, but that they were "indisputably different."[150] In the end the tribunal concluded that choice was better than no choice and allowed the claimant to import ICSID arbitration on the basis of the MFN provision in the basic treaty.[151]

139. The question of whether the provision in the third party treaty sought to be relied on is in fact more favourable than the provision in the basic treaty that is sought to be avoided was not considered in any detail in the earlier decisions of investment tribunals. Generally it has been assumed that not having to litigate in domestic courts for 18 months is more favourable than having to wait and litigate. However, this might be questioned unless negative assumptions are made about the domestic courts in question.

(ix) The existence of policy exceptions

140. The *Maffezini* tribunal, seemingly concerned about the far-reaching implications of its decision, set out certain "public policy" exceptions where an MFN provision could not

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[147] *Impregilo*, para. 108.
[148] *Ibid.*; see also *Hochtief*.
[149] *ICS v. Argentina*, paras. 318–325.
[150] *Garanti Kos*, para. 92.
[151] *Ibid.*, paras. 94–97.

apply to procedural matters.[152] While subsequent tribunals have endorsed the idea that some public policy exceptions are necessary, they have not invoked these exceptions as a justification for their decision, even though in some instances they might have been applicable. For example, in the *Garanti Kos* case the tribunal substituted ICSID arbitration for UNCITRAL arbitration, something that the *Maffezini* policy exceptions prohibited. The Study Group noted the divergence in the reasons given for allowing or rejecting the use of an MFN clause as a basis for varying the dispute settlement provisions of bilateral investment agreements and observed that different approaches were sometimes based on differences in assumptions rather then on a direct contradiction in reasoning.

Part III – Considerations in interpreting MFN clauses

A. Policy considerations relating to the interpretation of investment agreements

1. Asymmetry in BIT negotiations

141. In the past, investment agreements were largely between developed and developing countries with an assumption of asymmetry and inequality of bargaining power.[153] Today, many bilateral investment agreements are between developed countries or developing countries themselves where the same point cannot be made.

142. A more substantive comment can be made about the process of negotiation of investment agreements. Some countries have their own model bilateral investment agreement, and negotiations with other countries are generally based on that model agreement. Thus, instead of negotiations starting with a clean slate, negotiations entail accepting or modifying the model form of agreement already prepared by one party. Thus, the most that can result from these negotiations are modifications in the wording of particular provisions, rather than a completely new agreement.

143. This notwithstanding, in fact investment agreements resemble each other in many key respects, regardless of the parties and regardless of the model agreement that is being followed. And this is not surprising. Modern investment agreements are founded on certain core provisions: MFN, National Treatment, Fair and Equitable Treatment, prohibition of expropriation unless certain conditions are fulfilled and provisions for dispute settlement, generally including investor-state dispute settlement. Whether there has been asymmetry in the negotiations or not, a similar result seems to be reached.

144. After considering this question of asymmetry, the Study Group took the view that while this was a factor that contributed to a broader understanding of the field of international investment law, it was not a factor that was relevant to the interpretation of individual investment agreements.

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[152] See paras. 88–90.

[153] Jeswald W. Salacuse and Nicholas P. Sullivan, "Do BIT's Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain" *Harvard International Law Journal*, vol. 46 (2005), p. 67 at 78.

2. The specificity of each treaty

145. Several States have stated that MFN provisions are specific to each treaty[154] and therefore that such provisions are ill suited to the adoption of a uniform approach.[155] There is no doubt that MFN provisions relating to investment are largely contained in separate bilateral investment agreements, and that each agreement has worded its MFN provision in a particular way.

146. At the same time, MFN provisions, regardless of their negotiating history, or the agreement in which they are contained, have a common objective. In 1978, in draft article 4 the Commission defined an MFN clause, as "a treaty provision whereby a State undertakes an obligation to another State to afford most favoured nation treatment in an agreed sphere of relations." In draft article 5, the Commission defined MFN treatment as "treatment accorded by the granting State to the beneficiary State ... not less favourable than treatment extended by the granting State to a third State." In other words, regardless of the specific wording, if a clause in a treaty accords no less favourable treatment than that granted to third States, it is an MFN clause. It has the same character as any other MFN clause and shares the same overall objective.

147. However, the way in which that overall objective is achieved lies in the actual wording that is used to express the MFN obligation, its scope, its coverage, and its beneficiaries. Thus, the key question of *ejusdem generis* — what is the scope of the treatment that can be claimed — has to be determined on a case-by-case basis.

148. Nonetheless, the Study Group considered that the common objective of all MFN provisions, and the similarity in the language used across many investment agreements means that the interpretation of an MFN provision in one investment agreement may well provide guidance for the interpretation of an MFN provision in another agreement. Investment tribunals have indeed considered provisions under agreements other than the agreement before them in seeking to interpret an MFN provision.

149. However, the interpretation of any particular MFN provision must be in accordance with articles 31–33 of the VCLT. Thus, while guidance can be sought from the meaning of MFN treatment in other agreements each MFN provision must interpreted on the basis of its own wording and the surrounding context of the agreement it is found in. As a result, there is no basis for concluding that there will be a single interpretation of an MFN provision applicable across all investment agreements.

B. Investment dispute settlement arbitration as "mixed arbitration"

150. In 1978, the Commission envisaged that the beneficiary of an MFN provision could not only be the State that was party to the agreement containing that provision, but could also be "persons and things in a determined relationship with that State."[156] Under investment agreements States generally offer MFN treatment not just to the other State, but also to investors or investments of that other State. The Commission at that time declined to consider further the implications of the beneficiary being a person, taking the view that

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[154] A/C.6/65/SR.25, at paras. 75–76 (Portugal); A/C.6/66/SR.27 at para. 49 (Iran (Islamic Republic of)); A/C.6/66/SR.27, at para. 78 (Portugal); A/C.6/66/SR.28 (United Kingdom); A/C.6/67/SR.23 (Iran (Islamic Republic of)).

[155] A/C.6/65/SR.26, at para. 17 (United States of America); A/C.6/66/SR.27, at para. 94 (United States of America).

[156] *Yearbook ... 1978*, vol. II (Part Two), p. 21 (draft art. 5).

since the draft articles of the VCLT did not deal with the application of treaties to individuals, it would not pursue that question.

151. In practical terms, however, at the time the 1978 draft articles were elaborated there was very little practice to consider in relation to individuals as beneficiaries. Enforcement of the obligation to provide MFN treatment against the granting State lay with the beneficiary State. Failure to provide MFN treatment would be a treaty breach and, provided there was a forum in which to do so, a state-to-state claim could be brought. There was no international forum for access by an investor against a foreign State, although an investor might well have pursued a claim in the domestic courts of that State if the treaty obligations had been made part of domestic law, or where there was an independent right of action under domestic law. In such situations, a claim brought against the granting State in its domestic court would be based on a right derived not from the treaty but from the granting State's domestic law.

152. The advent of investor-state dispute settlement has brought about a major change in this respect, allowing the investor to bring a claim independently of its State, directly against the granting State, in a dispute settlement mechanism created by the parties in the investment agreement. The result has been that investor-state dispute settlement tribunals have produced a substantial jurisprudence on the interpretation of investment agreements and in particular of MFN clauses.

153. However, the mixed nature of investor-state arbitration poses particular challenges in the interpretation of investment agreements. The agreement is between States and thus is a treaty. But the forum in which it is being interpreted bears some analogy with commercial arbitration, which historically is a private rather than a public law institution. Thus, whether an interpreter views the agreement as an international law instrument rather than as a contractual arrangement may have an impact on the way in which an MFN provision will be interpreted.

154. Questions can be raised about the status of tribunals involved in "mixed" arbitration and of the product of their work. These tribunals are "mixed" in the sense that the parties to the dispute are not of equal status under international law. In the days of concession agreements, the agreement itself was between a public international law entity, the State, and a private law entity, the person or company with whom the agreement was entered into. An initial concern in this regard was whether such agreements, where only one party was a subject of international law, were subject to international law or domestic law, and the concepts of transnational law and quasi-international law were debated.

155. Investment agreements avoid this problem because they are clearly treaties. Nonetheless, a dispute under an investor-state dispute settlement provision remains a dispute between parties of different status under international law. Thus, it has been said that an arbitrator in a mixed arbitration dealing with a claim by a private litigant, in what might otherwise be seen as a domestic claim, has a mission and function not dissimilar from that of a domestic judge.[157] In that sense, investor-state dispute settlement might be seen as an alternative to domestic litigation, a point that is reinforced by the common "fork in the road" provisions in investment agreements where a claimant investor is required at a certain point to choose between domestic litigation or investor-state dispute settlement.

156. However, a tribunal hearing such a dispute, which is a tribunal established under a mechanism agreed to by States, has to interpret and apply the provisions of a treaty. It is not usually applying provisions of domestic law although in some cases the treaty may call for

[157] On the overlap between public and private aspects of international arbitration, see: Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford: Oxford University Press, 2007), chap. 3.

the application of domestic law. Moreover, if the tribunal is established under ICSID it is specifically mandated to apply "such rules of international law as may be applicable."[158]

157. The Study Group concluded that the "mixed" nature of investor-state dispute settlement arbitration does not justify a different approach to the application of the rules on treaty interpretation when MFN provisions are being considered. The investment agreement is a treaty whose provisions have been agreed to by States. The individual investor had no role in the creation of the treaty obligations; it simply has a right to bring a claim under the treaty. As a treaty it must be interpreted according to the accepted rules of international law governing treaty interpretation.

C. The contemporary relevance of the 1978 draft articles to the interpretation of MFN provisions

158. As the Study Group noted earlier, the 1978 draft articles contemplated that the beneficiary of an MFN provision might be an individual or an entity "in a determined relationship" with the beneficiary State. But it did not consider the implications of this since it regarded the rights of individuals to be outside its mandate. Nonetheless, the draft articles are frequently referred to by investor-State dispute settlement tribunals as setting out the basic law on MFN provisions, in particular in relation to the *ejusdem generis* principle.

159. The Study Group noted, however, that while the 1978 draft articles provide the core law on the definition and meaning of MFN clauses and MFN treatment, and lay down basic principles, they do not provide guidance on specific questions of interpretation that can arise under the terms actually used in a particular treaty. The issue whether a procedural provision relating to dispute settlement can be modified on the basis of an MFN provision is not answered, at least not directly, by the 1978 draft articles.

160. The Study Group considers that, having never been challenged and having been frequently applied, the core provisions of the 1978 draft articles[159] remain as an important source of international law when considering the definition, scope and application of MFN clauses.

Part IV – Guidance on the interpretation of MFN clauses

161. This Part sets out a framework for the proper application of the principles of treaty interpretation to MFN clauses. The Study Group concluded from its earlier analysis that there are three central questions regarding the way in which tribunals have approached the interpretation of MFN clauses in relation to the dispute settlement provisions. First, are MFN provisions in principle capable of applying to the dispute settlement provisions of BITs? Second, is the jurisdiction of a tribunal affected by conditions in BITs regarding which dispute settlement provisions may be invoked by investors? Third, in determining whether an MFN provision in a BIT applies to the conditions for invoking dispute settlement, what factors are relevant in the interpretative process? These issues are taken up in turn in the sections below.

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[158] Convention on the settlement of investment disputes between States and nationals of other States, done at Washington on 18 March 1965, United Nations *Treaty Series*, vol. 575, p. 159 at art. 42.

[159] See especially arts 1–14, *Yearbook ... 1978*, vol. II (Part Two), pp. 16–39.

1. MFN provisions are capable in principle of applying to the dispute settlement provisions of BITs

162. Although controversial in some of the earlier decisions of tribunals, there is little doubt that in principle MFN provisions are capable of applying to the dispute settlement provisions of BITs. This is so notwithstanding the fact that the proposition may have been based initially on a misinterpretation of what the Commission of Arbitration in *Ambatielos* meant when it referred to "the administration of justice" being within the scope of an MFN provision that referred to "all matters relating to commerce and navigation." The Commission there was referring to access to the courts of the United Kingdom for enforcing substantive rights and not to a right to alter the conditions under which dispute settlement may be invoked. But that seems of little import now. The point is essentially one of party autonomy; the parties to a BIT can, if they wish, include the conditions for access to dispute settlement within the scope of coverage of an MFN provision. The question in each case is whether they have done so.

163. In this sense, the question is truly one of treaty interpretation that can be answered only in respect of each particular case. Where the parties have explicitly included the conditions for access to dispute settlement within the framework of their MFN provision,[160] then no difficulty arises. Equally, where the parties have explicitly excluded the application of MFN to the conditions for access to dispute settlement, no difficulty arises. But the vast majority of MFN provisions in existing BITs are not explicit on this point and thus the question of how such provisions are to be interpreted will arise in each case. At the very minimum, however, it can be said that there is no need for tribunals interpreting MFN provisions in BITs to engage in any enquiry into whether such provisions may in principle be applicable to dispute settlement provisions.

2. Conditions relating to dispute settlement and a tribunal's jurisdiction

164. Accepting, however, that the issue is one of interpretation, the question arises whether there is anything in the character of either MFN provisions or provisions relating to the conditions for investor access to dispute settlement that might be relevant to the interpretative process. In this regard, the question of whether such matters go to the jurisdiction of a tribunal retains relevance. There are certain parameters (*ratione materiae*, *ratione personae*, *ratione temporis* etc.) within which an MFN provision must operate,[161] and thus the question becomes whether the conditions relating to access to dispute settlement are themselves a relevant parameter.

165. The application of an MFN provision cannot be completely open-ended. As draft article 14 of the 1978 draft articles provides:

> "The exercise of rights arising under a most-favoured-nation clause for the beneficiary State or persons or things in a determined relationship with that State is subject to compliance with the relevant terms and conditions laid down in the treaty containing the clause or otherwise agreed between the granting State and the beneficiary State."

166. There is no doubt that if a State has consented in a BIT to recognize certain categories of persons as investors, an MFN provision cannot be invoked to change those categories.[162] A tribunal set up under the BIT simply has no jurisdiction to adjudicate on

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[160] UK Model BIT, 2008, available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2847>.

[161] See also para. 105 above.

[162] See *HICEE*.

rights in respect of an entity that does not constitute an investor. The question is whether a limitation on access to dispute settlement, such as an 18-month domestic litigation requirement, is a similar jurisdictional limitation applicable to qualified investors.

167. An answer to this depends, in part, on whether this is a matter of jurisdiction or a matter of admissibility. The distinction between jurisdiction and admissibility is not always clear and the terms are sometimes used interchangeably.[163] However, the distinction between objections that are directed at the tribunal and objections that are directed at the claim is said to be the basis of the distinction.[164]

168. On this basis, one might argue that the 18-month litigation requirement being a condition that determines whether a claim can be brought at all by the investor goes to the jurisdiction of the tribunal – it is not a matter of the particular claim that is being made by the investor; no claim can be made by that investor unless the 18-month litigation requirement has been met.

169. In the Study Group's view, these competing approaches reflect what was earlier mentioned – a difference between those who regard investment agreements as public international law instruments, and those who regard investor-state dispute settlement as being more of a private law nature akin to contractual arrangements. In the case of the former, jurisdiction and consent to arbitrate are matters of keen State interest, whereas in the case of the latter the question is simply one of the meaning of the term "treatment" or other such language which stipulates the entitlement of the beneficiary.

170. The practical consequence of these different approaches is that those who focus on the public international law aspect of investment agreements are inclined to see an 18-month litigation requirement as akin to an exhaustion of local remedies rule. Those who see such agreements more in private or commercial arbitration terms are likely to see it as a delaying provision which has the effect of postponing an investor's right to bring a claim, and hence contrary to the overall objective of a BIT of creating favourable conditions for investment.

171. The common feature of the "jurisdictional" approaches is that unless clearly worded, or there are particular contextual circumstances, an MFN provision cannot alter the conditions of access to dispute settlement. It is always a matter of treaty interpretation, but treaty interpretation that starts from an initial assumption that an MFN provision does not automatically apply to the dispute settlement provisions of a BIT. And this stands in contrast to the starting assumptions of a number of tribunals that MFN provisions on their face apply to dispute settlement, because dispute settlement is part of the protections provided in a BIT. Under that approach, MFN applies to dispute settlement unless it can be shown that the parties to the BIT did not intend that it would so apply.

172. The Study Group has taken the view that this partly conceptual debate about the nature of investment agreements and the assumptions that it leads to about interpretation of those agreements is not something on which a definitive solution can be offered. Investment agreements have elements of both a public and a private nature. The inability to have a formal definitive answer is the consequence of having the matter dealt with through a "mixed" arbitration with "*ad hoc*" arbitrators. In a "closed" system, such as the WTO, an

[163] See generally: Shabtai Rosenne, *The Law and Practice of the International Court, 1920–2005*, 4th ed (Leiden: Martinus Nijhoff Publishers, 2006) at pp. 505–586.

[164] Jan Paulsson, "Jurisdiction and Admissibility" in Gerald Aksen, Karl-Heinz Böckstiegel, Michael J. Mustill, Paolo Michele Patocchi, and Anne Marie Whitesell (eds), *Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in Honour of Robert Briner* (Paris: ICC Publishing, 2005) p. 601 at p. 616.

appellate tribunal could resolve the matter and, right or wrong, it would be the answer for all cases within the system. That opportunity is not available in the case of investor-state dispute settlement. Nor, in the view of the Study Group, is it appropriate for the Commission to play such a role.

173. However, the Study Group observes that conclusions about the applicability of MFN clauses to dispute settlement provisions should be based on the interpretation and analysis of the provisions in question and not on assumptions about the nature of investment agreements or of the rights that are granted under them.

3. Relevant factors in determining whether an MFN provision applies to the conditions for invoking dispute settlement

174. Since BITs are international agreements, the rules of treaty interpretation set out in articles 31–33 of the VCLT are applicable to their interpretation.[165] The general rule of treaty interpretation is set out in article 31 of the VCLT, paragraph (1) of which provides that treaties "shall be interpreted in good faith in accordance with the ordinary meaning of the terms of the treaty in their context and in the light of its object and purpose."[166] It has been said that this formula was "clearly based on the view that the text of the treaty must be presumed to be the authentic expression of the intention of the parties."[167] Articles 31 and 32 elaborate on the weight that might be attached to various factors in the interpretation of the treaty.

175. It is a common position taken in decisions of investment tribunals that the VCLT rules provide the correct legal framework for interpreting MFN provisions. Yet within this common framework there are divergences of approach. Earlier the Study Group identified various factors that have appeared to influence tribunals in interpreting MFN provisions. In the following paragraphs the Study Group reviews some of these factors.

(a) The principle of contemporaneity

176. The principle of contemporaneity, relied on explicitly by the tribunals in *ICS* and *Daimler*, and implicitly in the decisions of some other tribunals,[168] is not found specifically in the VCLT rules. Yet, it has been adverted to directly and indirectly by the International Court of Justice and by international tribunals. In *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, the Court referred to the "primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion."[169] The Eritrea-Ethiopia Boundary Commission also endorsed what it referred to as "the doctrine of 'contemporaneity'."[170]

177. Another view is that interpretation should be evolutionary, taking into account the development in the meaning of generic terms used in the treaty over time, particularly in the light of changes in the relevant law. However, as has been pointed out, while an evolutionary approach can be applied to generic "terms in a treaty which are by their very

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[165] These provisions on interpretation are generally taken to reflect customary international law.

[166] *Ibid.*, at art. 31 (1).

[167] Ian Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed (Manchester: Manchester University Press, 1984) at p. 115.

[168] *ICS v. Argentina*; *Daimler*; *Plama*, para. 197.

[169] *Legal consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16 at p. 30, para. 53.

[170] *Decision Regarding the Delimitation of the Border between the State of Eritrea and the Federal Democratic Republic of Ethiopia*, (13 April 2002) UNRIAA vol. XXV, pp. 83–195 at para. 3.5.

nature expressed in such general terms as to lend themselves to an evolutionary interpretation," this cannot be done to "conflict with the intentions and expectations of the parties as they may have been expressed during the negotiations preceding the conclusion of the treaty."[171]

178. In the view of the Study Group, whether an evolutionary interpretation is appropriate in any given case will depend on a number of factors, including the intention of the parties that the term in question was to be interpreted in an evolutionary way,[172] the subsequent practice of the parties, and the way they themselves have interpreted and applied their agreement. The approach of the *ICS* tribunal in seeking to ascertain the meaning of "treatment" to which the MFN provision applied, by looking at how the term would have been understood at the time the UK-Argentina BIT was entered into, provides important guidance for interpretation but it cannot be regarded as necessarily definitive.

(b) The relevance of preparatory work

179. In a sense, reference to preparatory work is an application of the contemporaneity principle, since it is an effort to determine the intent of the parties at the time of the conclusion of the agreement. Recourse to preparatory work is not frequent in the decisions of tribunals interpreting MFN provisions, perhaps because such material is often not readily available.[173] However, in *Austrian Airlines*, the tribunal looked at successive drafts of clauses of the treaty, which indicated a successive narrowing of the scope of the arbitration provisions, in order to confirm a conclusion that the parties intended to limit arbitration under that agreement to certain specified matters.[174] The Study Group considered that this provides an important illustration of the relevance of preparatory work.

(c) The treaty practice of the parties

180. Contemporary or subsequent practice of the parties is clearly relevant to the interpretation of the provisions of a treaty. However, under VCLT article 31 (2) and (3) relevant practice is limited to: agreements relating to the treaty entered into by all of the parties; instruments relating to the treaty concluded by one party and accepted by the others; subsequent agreements between the parties; and subsequent practice that establishes the agreement of the parties.[175] Thus, to the extent that investment tribunals rely on such material they are clearly acting in accordance with relevant interpretative material.

181. However, most BITs stand alone as agreements between two States unaccompanied by contemporaneous or subsequent agreements or practice between the parties to the BIT.[176] Thus, what tribunals often refer to are agreements by one of the parties to the BIT

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[171] Sinclair, at p. 140.

[172] International Law Commission, Subsequent agreements and subsequent practice in relation to the interpretation of treaties, doc. A/CN.4/L.813, at draft conclusion 3. See also the continuance of this document in: International Law Commission, Subsequent agreements and subsequent practice in relation to the interpretation of treaties, doc. A/CN.4/L.833. See also *Official Records of the General Assembly, Sixty-eighth session, Supplement 10* (A/68/10), chap. IV.

[173] The tribunal in *Plama*, para. 196, noted that the parties had failed to produce any *travaux préparatoires*.

[174] *Austrian Airlines*, para. 137.

[175] International Law Commission, Subsequent agreements and subsequent practice in relation to the interpretation of treaties, doc. A/CN.4/L.813 [part 1], and A/CN.4/L.833 [part 2]. See especially draft conclusion 7. See also *Official Records of the General Assembly, Sixty-ninth session, Supplement 10* (A/69/10), chap. VII.

[176] Under NAFTA however, the parties do have the power under the treaty to issue "authoritative interpretations" which are then binding on tribunals. See NAFTA, at art. 1131 (2).

with third States.[177] One tribunal has taken the view that treaties with third States were not relevant because it was the text of the BIT before it that had to be interpreted.[178]

182. The actions of one State party to a BIT that do not involve the other State party might have some contextual relevance by demonstrating the attitude of one of the parties to the treaty. However, such actions do not fall under article 31 (3) (b) of the Vienna Convention, which considers the common intent of the parties. Unilateral action could only be taken into account under article 32.

183. The question, however, is whether there is any other basis on which the treaty-making practice of one party alone can be relevant. In *ICS* the tribunal took the view that the treaty making practice of one party alone was not relevant. However, it did regard as relevant the fact that a State had continued to include an 18-month requirement in subsequent BITs. The tribunal considered that the State was unlikely to be insisting on the conclusion of a provision that it knew would be devoid of any *effet utile* because of the inclusion of an MFN provision.[179] This illustrates the potential, albeit limited, relevance of the practice of one party.

(d) The meaning of context

184. The term "in their context" in article 31 is capable of having a broad meaning. It includes, by virtue of article 31 (2) the terms of the treaty itself, the preamble and annexes, as well as agreements between the parties relating to the treaty in connection with its conclusion, and instruments relating to the treaty made by one party and accepted by the other party as an instrument related to the treaty.

185. Two particular questions relating to context arise out of the decisions of investment tribunals. First, can a specific provision in a BIT be overridden by a more generally worded MFN provision? Second, what is the relevance of the fact that a BIT lists specific exclusions to the application of the MFN principle? Does that exclude other, non-listed exceptions to MFN?

(i) The balance between specific and general provisions

186. In some decisions arbitrators have sought to weigh the specific provision of a treaty, dealing with the circumstances under which an investor can invoke investor-state arbitration, with the general provision of an MFN clause. The conclusion drawn is that a specific statement concerning treatment afforded under a treaty, such as a condition that has to be met before invoking dispute settlement, cannot be overridden by a general statement applicable to "all treatment" as found in an MFN provision. As the Commission noted in its report on fragmentation, the principle *lex specialis derogat legi generali* is generally accepted as a principle of treaty interpretation.[180] However, its relevance in the context of the interpretation of an MFN provision may be limited.

187. By its very nature, an MFN clause promises something better than what is provided in the treaty, so that the mere fact that there is a specific provision in the basic treaty itself cannot be conclusive on whether an MFN provision can provide better treatment than what

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[177] In *Plama* the tribunal said: "It is true that treaties between one of the Contracting Parties and third States may be taken into account for the purpose of clarifying the meaning of a treaty's text at the time it was entered into." *Plama*, para. 195.

[178] *Renta*.

[179] *ICS v. Argentina*, paras. 314–315.

[180] Conclusions of the work of the Study Group on the Fragmentation of international law: Difficulties arising from the diversification and expansion of international law, *Yearbook ... 2006*, vol. II, Part Two, at conclusion 5.

is already provided for in the basic treaty. Of course, if there is independent interpretative evidence in the treaty to show that the parties intended the MFN provision not to apply to the specific provision in question, then that is a different matter. But, in the view of the Study Group, a presumption that the specific overrides the general is simply inconclusive in the interpretation of an MFN provision.

(ii) The expressio unius *principle*

188. The principle *expressio unius est exclusio alterius* has often been cited, particularly in relation to express exclusions from the application of an MFN provision. The argument goes that where the BIT contains express exceptions to the application of an MFN provision, those exceptions exclude other non-designated exceptions.[181] Thus, failure to include any reference to dispute settlement provisions amongst those matters excluded from the application of an MFN provision implies that the MFN provision covers dispute settlement. However, as noted by some authors, the *expressio unius* principle is at best a presumption and should not be treated as a definitive answer to the question.[182] It is a factor to consider and nothing more. Further, as the tribunal in ICS pointed out, it may lead to the opposite conclusion. If only exceptions relating to substantive treatment are listed, that may imply that the parties did not believe MFN to be relevant to procedural or dispute settlement matters.[183] Accordingly, the Study Group took the view that while the *expressio unius* principle is a factor to be taken into account, it cannot be regarded as a decisive factor.

(e) The relevance of the content of the provision sought to be replaced

189. The 18-month litigation requirement has been seen by some tribunals as imposing an unnecessary hurdle for an investor seeking to enforce its rights through the invocation of the dispute settlement provision of a BIT and contrary to the general objective of a BIT in promoting and facilitating investment. However, as other tribunals have pointed out, such a provision is a variation of an exhaustion of local remedies rule and has its own rationale. To the extent that investment tribunals have been influenced in the interpretation of an MFN provision by the content of the provision in the basic treaty that is being affected by the application of MFN, the Study Group has difficulty in seeing how such a consideration can be justified under the rules on treaty interpretation.

190. The policy decision whether to include a particular provision in their BIT is for the parties and not something that can be second-guessed by dispute settlement tribunals. The function of the tribunal is to ascertain the meaning and the intent of the parties, not to query their policy choices. On that basis, the content of a provision that is being bypassed by application of the MFN provision is, in the view of the Study Group, irrelevant as far as treaty interpretation is concerned.

(f) The interpretation of the provision sought to be included

191. The question of the scope or extent of the benefit that can be obtained from the third party treaty by operation of MFN raises the application of the *ejusdem generis* principle. It is clear that if the subject matter of the MFN provision in the basic treaty is limited to substantive matters, then the provision cannot be used to obtain the benefit of procedural rights under the third party treaty. The more difficult question is whether the beneficiary of

[181] See Separate Opinion of Charles N. Brower in *Austrian Airlines*.

[182] Anthony Aust, *Modern Treaty Law and Practice*, 2nd ed (Cambridge: Cambridge University Press, 2007), pp. 248–249.

[183] *ICS v. Argentina*, paras. 315–317.

an MFN provision that does relate to procedural provisions may pick and choose which procedural benefits can be relied on.

192. In this regard, while the 1978 draft articles provide a general answer, they are not specific enough to assist in resolving the actual problem that arises in the investment treaty context. Draft articles 9 and 10 refer to the beneficiary State being entitled to rights or treatment "within the limits of the subject-matter of the clause." The commentary goes on to suggest that the phrase "within the limits of the subject-matter of the clause" contains an implicit reference to a concept of likeness.[184] However, investment tribunals have yet to develop any jurisprudence on the notion of likeness. There is no common understanding, to take the earlier example, on whether an 18-month litigation requirement with no fork in the road provision is more or less favourable than direct access to investor-state arbitration with a fork in the road stipulation attached.

193. In the Study Group's view the question of what constitutes less favourable treatment can only be answered on a case-by-case analysis. At the very least it is a matter that has to be addressed in any interpretation or application of an MFN provision.

4. Consequences of various model MFN clauses

194. Although at the outset of its work the Study Group considered the possibility of drafting model MFN clauses itself, it came to the conclusion that this would not be a useful exercise. There is a vast number of MFN clauses already included by States in their investment agreements that can provide models for future agreements. What is more important is to understand the consequences that may attach to particular wording.

(a) Clauses in agreements existing at the time of the *Maffezini* decision

195. Aside from the different interpretative approaches already identified, there appears to be a certain commonality in the interpretation of certain types of wording in MFN clauses.

196. First, where the MFN clause provides simply for "treatment no less favourable" without any qualification that arguably expands the scope of the treatment to be accorded, tribunals have invariably refused to interpret such a provision as including dispute settlement.

197. Second, where the MFN clause contains clauses that refer to "all treatment" or "all matters" governed by the treaty, tribunals have tended to accord a broad interpretation to these clauses, and to find that they apply to dispute resolution provisions. In only one case has a broadly worded clause not been treated as applying to dispute settlement.[185]

198. Third, where the MFN clause qualifies the treatment to be received by reference to "use", "management", "maintenance", "enjoyment", "disposal", and "utilization", a majority of tribunals have found that such clauses are broad enough to include dispute resolution provisions.

199. Fourth, in the two cases which link MFN directly to fair and equitable treatment, neither concluded that the clause covers dispute settlement provisions.

200. Fifth, in the cases where a territorial limitation has been placed on an MFN clause, the result has been mixed. Some cases have concluded that the territorial limitation is irrelevant to deciding whether dispute resolution provisions are concerned,[186] while others

[184] *Yearbook ... 1978*, vol. II (Part Two), pp. 33 at paras. 25–26.
[185] *Berschader*.
[186] *Maffezini*, para. 61; *Hochtief*, paras. 107–111 (majority).

have held that a territorial limitation clause prevents the inclusion of international dispute settlement provisions within an MFN clause.[187]

201. Sixth, in no case where MFN clauses limit their application to investors or investments "in like circumstances" or "in similar situations" has a tribunal treated as relevant the question of whether the clause applies to dispute settlement provisions.

202. Such an analysis indicates past practice, and does not constitute a statement about how cases will be decided in the future. Since investment tribunals are *ad hoc* bodies and since the exact provisions and context of MFN clauses vary, it is impossible to tell in advance how the members will decide, even if some or all of the individuals have already decided cases involving MFN provisions. However, where MFN clauses are capable of a broader interpretation, it appears that tribunals are more inclined to treat them as applying to dispute settlement provisions. In the Study Group's view, this provides preliminary guidance to States on how particular wording might be treated by tribunals.

(b) Clauses in agreements entered into since the *Maffezini* decision

203. Since the *Maffezini* decision, there have been a number of investment agreements entered into which include MFN provisions. Generally, they fall into three categories.

204. First, there are agreements that expressly exclude the application of *Maffezini*. This may be done by express reference to the decision,[188] or by providing that dispute settlement provisions do not fall within the scope of the MFN provision.[189] It generally does not seem to be done by including it in the list of the exceptions to the application of MFN.

205. Second, there are agreements that expressly include dispute settlement provisions within the scope of the MFN clause.[190]

206. Third, there are those agreements that make no mention of whether dispute settlement provisions are included within the scope of the MFN clause. Some define the scope of application of the MFN clause as applying "to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory." However, as noted earlier, such a provision has been interpreted by some tribunals as not including dispute settlement and by other tribunals as including them.

207. The Study Group has noted that the issue of MFN and dispute settlement provisions has not motivated States to clarify the language of existing agreements to exclude dispute settlement, nor to negotiate new agreements that exclude its application. In fact most new agreements tend to ignore the issue. There are at least three possible explanations for this.

208. First, renegotiating existing agreements is a long and complex process and States may not place a high priority on this in their treaty-making agenda or may be concerned with reopening other issues in the treaty.

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[187] *ICS v. Argentina*, paras. 296, 305–308; *Daimler*, paras. 225–231, 236 (majority).

[188] Draft Central American free trade agreement (28 January 2004), available at <http://www.sice.oas.org/TPD/USA_CAFTA/Jan28draft/CAFTAind_e.asp>.

[189] Agreement between the Republic of Colombia and the Swiss Confederation on the promotion and reciprocal protection of investments, done in Berne on 17 May 2006, available at <http://investmentpolicyhub.unctad.org/IIA/country/45/treaty/1008>.

[190] Agreement between Japan and the United Mexican States for the strengthening of the economic partnership, done at Mexico City on 17 September 2004, available at <http://www.sice.oas.org/Trade/MEX_JPN_e/agreement.pdf>. The United Kingdom has not changed its Model BIT, which applies MFN to dispute settlement.

209. Second, States may be concerned that changing the wording of their new agreements to prevent the application of MFN treatment to dispute settlement will be taken by tribunals as an indication that their existing agreements do cover dispute settlement.

210. Third, States may take the view that in practice, as indicated above, MFN provisions have been applied to dispute settlement only in the case of broadly-worded MFN clauses and that their MFN provisions are not broadly-worded.

211. In any event, the Study Group concluded that the guidance provided here of wording that may be interpreted as incorporating dispute settlement provisions within the scope of MFN, and examples of agreements where governments have explicitly excluded it, might be of assistance to States in considering how their investment agreements might be interpreted and what they might take into account in negotiating new agreements.

Part V – Summary of conclusions

212. MFN clauses remains unchanged in character from the time the 1978 draft articles were concluded. The core provisions of the 1978 draft articles continue to be the basis for the interpretation and application of MFN clauses today. However, they do not provide answers to all the interpretative issues that can arise with MFN clauses.

213. The interpretation of MFN clauses is to be undertaken on the basis of the rules for the interpretation of treaties as set out in the VCLT, articles 31–32.

214. The central interpretative issue in respect of the MFN clauses relates to the scope of the clause and the application of the *ejusdem generis* principle. That is, the scope and nature of the benefit that can be obtained under an MFN provision depends on the interpretation of the MFN provision itself.

215. The application of MFN clauses to dispute settlement provisions in investment treaty arbitration, rather than limiting them to substantive obligations, brought a new dimension to thinking about MFN provisions and perhaps consequences that had not been foreseen by parties when they negotiated their investment agreements. Nonetheless, the matter remains one of treaty interpretation.

216. Whether MFN clauses are to encompass dispute settlement provisions is ultimately up to the States that negotiate such clauses. Explicit language can ensure that an MFN provision does or does not apply to dispute settlement provisions. Otherwise the matter will be left to dispute settlement tribunals to interpret MFN clauses on a case-by-case basis.

217. The interpretative techniques reviewed by the Study Group in this report are designed to assist in the interpretation and application of MFN provisions.